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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911, 1912.

No. ~~1015~~ 575

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JAMES A. MURRAY, DOING BUSINESS AS THE POCA TELLO  
WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF POCA TELLO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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FILED MARCH 14, 1912.

(23,091)

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1 & 2 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Pocatello, plaintiff, and James A. Murray, doing business as The Pocatello Water Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

3 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of February, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,

*Clerk of the Supreme Court of the United States.*

Allowed by

JOSEPH McKENNA,

*Associate Justice of the Supreme Court  
of the United States.*

4 [Endorsed:] No. 1902. In the Supreme Court of the State of Idaho. The City of Pocatello, a municipal corporation, Plaintiff, v. James A. Murray, doing business as The Pocatello Water Co., Defendant. Writ of Error. Filed this 12 day of Feb. 1912. I. W. Hart, Clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,

*Supreme Court of Idaho, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Idaho, in the City of Boise, this 4th day of March, 1912.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,

*Clerk Supreme Court of Idaho.**Costs of Suit.*

Plaintiff's costs, \$76.75, paid by The City of Pocatello.

Defendant's costs, \$44.30, paid by James A. Murray.

Costs of transcript, \$17.45, paid by James A. Murray.

I. W. HART,

*Clerk Supreme Court of Idaho.*

In the Supreme Court of the State of Idaho.

No. —.

THE CITY OF POCA TELLO, a Municipal Corporation, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

Original Proceedings for Writ of Mandate.

*Transcript of Pleadings.*

P. C. O'Malley, Pocatello, Idaho; Clark & Budge, Pocatello, Idaho; Richards & Haga, Boise, Idaho, attorneys for plaintiff.

Geo. E. Gray, Pocatello, Idaho; N. M. Ruick, Boise, Idaho, attorneys for defendant.

Filed — —, 1911.

— —, Clerk.

7 In the Supreme Court of the State of Idaho.

No. —.

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs  
JAMES A. MURRAY, Doing Business as The Pocatello Water Com-  
pany, Defendant.

Original Proceedings for Writ of Mandate.

*Transcript of Pleadings.*

P. C. O'Malley, Pocatello, Idaho; Clark & Budge, Pocatello, Idaho; Richards & Haga, Boise, Idaho, attorneys for plaintiff.

Geo. E. Gray, Pocatello, Idaho; N. M. Ruick, Boise, Idaho, attorneys for defendant.

Filed — —, 1911.

— —, Clerk.

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## 9 In the Supreme Court of the State of Idaho.

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
 vs.  
 JAMES A. MURRAY, Doing Business as The Pocatello Water Com-  
 pany, Defendant.

*Affidavit for Writ of Mandate.*

STATE OF IDAHO,  
 County of Bannock, ss:

J. M. Bistline being first duly sworn, deposes and says: that he is the duly elected, qualified and acting mayor of the City of Pocatello above named, and that he makes this affidavit and application for and on its behalf, and avers:

## I.

That at all times hereinafter mentioned it was, and it now is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho.

## II

That the defendant, James A. Murray, doing business under the name of "The Pocatello Water Company" is the owner of a system of water works, consisting of reservoirs, water mains, pipes and conduits, by means of which water is diverted from what are commonly known as Mink and Gibson Jack Creeks for the use of the said city of Pocatello for fire purposes and for street sprinkling and  
 10 for the use of the inhabitants of said city for culinary and domestic purposes and for the purpose of irrigation, and said water system is the only present source of supply for the purposes aforesaid.

## III

That said defendant as to the rates and charges for water furnished for the purposes aforesaid during all times herein mentioned has, since the passage thereof, assumed to act in accordance with the provisions of a certain Ordinance of the said City of Pocatello passed and approved on the 6th day of June, 1901, and designated as Ordinance No. 86, a copy of which said Ordinance is hereto attached marked "Exhibit A" and made a part hereof.

## IV.

That on the 6th day of July, 1911, the plaintiff acting through its city council at a meeting thereof duly and regularly called and held, duly passed a resolution that the schedule of charges for water and water service, both public and private, supplied and furnished to said City of Pocatello and its inhabitants by the defendant is not fair, equitable or reasonable, and that a commission should be appointed pursuant to the provisions of Section 2839 Revised Codes

of Idaho, 1909 to fix and determine the rates to be charged for water and water service to said city and its inhabitants. It was further resolved that two commissioners, viz: J. H. Townsend and W. P. Havenor, tax payers of the City of Pocatello, Bannock County, Idaho, be and said persons were by said resolution duly appointed by plaintiff as commissioners to act in conjunction with other  
11 commissioners to be appointed pursuant to the provisions of said Section 2839, to fix and determine the rates to be charged for water and water service, both public and private, in said City of Pocatello. It was further resolved that the said defendant be given notice as provided by law of the appointment of said commissioners and that the demand be made upon him that within 30 days after said demand, defendant appoint a like number of commissioners to act in conjunction with those appointed by the plaintiff as in said Section 2839 provided.

### V.

That on the 15th day of July, 1911, the plaintiff caused to be served upon the defendant, James A. Murray, personally in the city of Butte, State of Montana, and on the 17th day of July caused to be served upon one George Winter, Superintendent of said Pocatello Water Company at the City of Pocatello, Bannock County, Idaho, a notice addressed to the defendant, notifying said defendant of the appointment by the plaintiff of the two commissioners heretofore named and requesting defendant to appoint two commissioners to act for himself as provided in said Section 2839, Revised Codes of Idaho, 1909, to which said notice was attached a copy of said resolution of the City Council of the City of Pocatello. That a copy of said notice and resolution is hereto attached marked "Exhibit B" and made a part hereof.

### VI.

That said defendant has failed, refused and neglected and still refuses to appoint commissioners in accordance with said notice so served upon him as aforesaid and as required by the Statute  
12 in such cases made and provided, but continues to charge for water and water service, both public and private, in accordance with the schedule set forth in paragraph II of said Ordinance 86 and as affiant is informed and believes justifies his refusal to appoint said commissioners by reason of the provisions of said Ordinance.

### VII.

That said schedule of rates and charges set forth in said Ordinance No. 86 is unreasonable, unjust, inequitable and oppressive and that plaintiff has no plain, speedy or adequate remedy in the ordinary course of law wherefore affiant prays that a writ of mandate issue forthwith out of this court commanding said defendant to appoint commissioners to act with the commissioners appointed by the plaintiff, as provided in Section 2839, Revised Codes of Idaho, 1909, for the purpose of determining the rates to be charged for water furnished to said City of Pocatello and the inhabitants thereof for the

purposes aforesaid; and affiant prays for such other judgment or order as may be proper together with its costs herein incurred.

J. M. BISTLINE.

Subscribed and sworn to before me this 23rd day of September, 1911.

[SEAL.]

P. C. O'MALLEY,  
*Notary Public.*

P. C. O'MALLEY and  
CLARK & BUDGE,  
*Attorneys for Plaintiff.*

Residence and P. O. Address, Pocatello, Idaho.

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### "EXHIBIT A."

#### *Ordinance No. 86.*

An Ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means of ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of a sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions, or of granting to others more favorable terms or franchises than that now held and granted to said James A. Murray.

#### Preamble.

Whereas, the town or village of Pocatello, on the 4th day of January, 1892, conferred and granted to F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the town or village of Pocatello for a period of fifty (50) years, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits, for the purpose of furnishing and supplying the said town or village of Pocatello, and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and,

14 Whereas, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said condition precedent, and obtained vested rights under said grant; and,

Whereas, the City of Pocatello is a city of the second class and is

the legal municipal successor of the said town or village of Pocatello; and,

Whereas, a commission duly appointed and constituted, did on or about the first day of September, 1896, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, then owner and holder of said privileges and franchises, for both public and private uses, which said rates were confirmed and continued by the provisions of Ordinance No. 56, approved June 8th, A. D. 1898; and,

Whereas, the rates and charges so fixed and continued are now deemed and considered to be fair, equitable, reasonable and just, and will continue to be fair, equitable, reasonable and just, in the near future; and,

Whereas, the said James A. Murray has succeeded to and is now the owner and holder of all property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including said water system complete, and all rights, privileges and franchises appurtenant thereto, or used therewith, and,

Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need  
15 of said city, and said James A. Murray agrees to bring in the waters of Mink Creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money; and,

Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and,

Whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the city of Pocatello, to extend and give the assurance asked for;

Now, therefore, be it ordained by the Mayor and Council of the city of Pocatello:

SECTION 1. That the privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello Town or Village Ordinance No. 46, passed and approved January 4th, 1892, are hereby ratified, continued and confirmed unto James A. Murray, and to his successors and assigns according to the terms of said original grant, he, the said James A. Murray, being the legal successor of the said F. D. Toms, John J. Cusick and James A. Murray, therein named.

SECTION 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by  
16 the Pocatello Water Company, to the city of Pocatello, and the inhabitants thereof heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the first day of September, 1896,



and now in full force and effect within the said city of Pocatello, is hereby declared to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said James A. Murray, for both public and private uses, except as hereinafter stated, to-wit:

### Schedule of Water Rates.

	Per month.
Bakery, for each baker.....	\$2.00
Bannock County (all water used in court house and jail) .	10.00
Barber shop, first chair.....	1.00
Each additional chair.....	.25
Bath, public, first tub.....	1.50
Each additional tub.....	.75
Beer house.....	\$2.00 to 3.50
Billiard Saloon, with bar.....	\$2.00 to 3.50
Blacksmith shop, per forge.....	.50
Book bindery, per hand.....	.50
Book bindery, minimum.....	1.50
Brick yard, per gang.....	2.50
Brick work (per thousand).....	.12 $\frac{1}{2}$
Butcher shop.....	2.00
Butcher shop, with steam boiler.....	4.50
Candy factory.....	2.00
Carriage shop, each hand.....	.50
Carriage shop, minimum.....	2.00
Church.....	1.50
17	
Cigar factory, per hand.....	.25
Cigar factory, minimum.....	2.00
Club rooms and halls.....	1.50
Coffee saloon.....	2.00
Confectionery.....	2.00
Cow.....	.25
Drug store.....	2.00
Dyeing or scouring works.....	3.00
Fire plugs, for fire only, (private).....	.50
Fountain, $\frac{1}{4}$ inch jet.....	6.00
Horse or mule.....	.25
Hose for private stable.....	.50
Hotel or boarding house, per room.....	.25
Hotel or boarding house, minimum.....	3.50
Hot water heating plant.....	\$2.00 to 5.00
House or private residence.....	1.50
Each bath in private residence.....	.50
Each water closet.....	.25
Laundry.....	\$5.00 to 30.00
Lawn sprinkling, first lot.....	1.00
Each additional lot.....	.50
Liquor store.....	\$2.00 to 2.50

Livery stable, first stall.....	.40
Livery stable, per vehicle.....	.20
Office, doctor, lawyer, etc.....	1.00
Each additional occupant.....	.25
Oyster saloon, each table, four to six persons.....	.50
Oyster saloon, minimum.....	2.00
Photograph gallery.....	3.00
Plastering, per yard.....	.00¾
Pocatello, city of, rent of fire hydrants now in use, or that may hereafter be required by the city, each.....	5.12½

18      Provided that the city shall be entitled to the use  
for street sprinkling or other necessary purposes,  
not to exceed four thousand (4,000) gallons of water per  
day, for each hydrant in use, in addition to the water used  
for fire purposes.

Printing office, per hand.....	.50
Printing office, minimum.....	1.50
Restaurant, each table of six persons.....	.50
Restaurant, minimum.....	3.00
School, each pupil.....	.01
School, minimum.....	2.00
Soda fountain.....	.50
Soda manufactory.....	7.00
Slaughter house.....	\$3.00 to 10.00
Steam boiler, each horse power to ten.....	1.00
Steam boiler, minimum.....	3.00
Steam heating, office building, per horse power to ten..	1.00
Steam heating, minimum.....	3.00
Stone work, per perch.....	.04
Store or shop.....	1.50
Urinal, public.....	1.50
Water closet.....	.25
Water closet.....	2.50
Wash basin, public.....	1.00

Provided, that in cases where consumers are paying for either residence or lawn sprinkling privileges no charge shall be made for one horse or cow, and where consumers are paying for both lawn and residence privileges no charge shall be made for one horse and one cow or for two horses or two cows.

SECTION 3. The foregoing rates and charges are hereby  
19      adopted by the city of Pocatello, by and for itself, and as  
trustees for the use and benefit of all private consumers of  
water within the corporate limits of said city for a period of five  
years from and after the passage and approval of this ordinance.  
At the expiration of said time, if the earnings of said water system  
shall exceed five per cent above reasonable expenses upon the value  
of said water system as then agreed upon, or as may be ascertained  
as hereinafter provided, then the rates as set forth in the "Schedule  
of Water Rates" of Section Two of this Ordinance, may be read-  
justed so as to yield not less than five per cent above reasonable ex-

penses on the valuation, but no readjustment shall hereafter be made that will yield less than five per cent above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section Four.

SECTION 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section three, and if the city of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained and determined in the following manner to-wit:

A committee of four experienced and disinterested hydraulic engineers who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree they shall select a fifth, and if they cannot agree upon a fifth, they shall request the President of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates and such decision shall be final.

SECTION 5. The city of Pocatello shall not hereafter grant to any individual, corporation or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, confirmed and continued in said James A. Murray; nor shall the city of Pocatello build, acquire, own or operate a water system of its own, until it has in good faith offered to purchase the water system of the said James A. Murray, or his successors or assigns, at a price to be ascertained as follows: If the owners of said water system and the city of Pocatello cannot agree upon the price then a committee of experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers shall be selected in the manner set forth in section four of this ordinance, who shall fix the value of said water system for the purposes of such sale, and the decision of a majority of such committee shall be final.

At intervals of five years from the approval of this ordinance and during a period of ninety days, immediately following the completion of each five year interval, the city may purchase the water system of the said James A. Murray or his successor or assigns, under the conditions specified in this section, but at no other time except by mutual consent of the city and the owner of said water system.

21 In fixing the value of said water system whether for the purpose of selling or of readjusting rates, the water system of the said James A. Murray, or his successor or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances,

machines, tools, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand and belonging to the said James A. Murray, in his capacity of furnishing water for any and all purposes to himself and to his customers, at Pocatello, Idaho, saving and excepting account books and records; and each article of property aforesaid shall be separately considered and evaluated by said committee; and in the event of the city of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the said city shall receive and pay for the whole plant as aforesaid, the said James A. Murray stepping out, and leaving all said property undisturbed and ready for the city to step in.

SECTION 6. Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than  
22 ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.

SECTION 7. That in consideration of the improvements named in this ordinance, the city of Pocatello hereby agrees to rent, receive and pay for, not less than forty-five (45) fire hydrants, at the schedule rate named in section 2 hereof; and within ninety days after the passage and approval of this ordinance to designate points on the water mains at which the extra hydrants shall be placed as soon as may be, the hydrants to be subject to rental from and after the date of their being placed in position.

SECTION 8. If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.

SECTION 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed this 6th day of June, 1901.

T. O. SMITH,

*City Clerk.*

Approved this June 6th, 1901.

THEO. TURNER, *Mayor.*

23

## "EXHIBIT B."

*Notice.*POCATELLO, IDAHO, *July 6, 1911.*

To James A. Murray, Pocatello Water Co.:

You are hereby notified that the City of Pocatello this day has appointed two commissioners to fix the rates to be charged for water in the City of Pocatello, Bannock County, Idaho, pursuant to the provisions of Section 2839 Revised Codes of Idaho. The two Commissioners appointed being J. H. Townsend and W. P. Havenor, and you are hereby called upon to appoint two commissioners to act for yourself and the Pocatello Water Company as provided in Section 2839, Idaho Revised Codes. A copy of the resolution appointing said commissioners is hereto attached and made a part hereof.

J. M. BISTLINE, *Mayor.*

Attest:

FINN H. BERG, *Clerk.*

Be It Resolved by the Mayor and City Council of the City of Pocatello, Bannock County, Idaho, that the schedule of charges for water and water service both public and private, supplied and furnished to the City of Pocatello and its inhabitants, by James A. Murray, doing business under the name and style of the Pocatello Water Company, as now in force, are not fair, equitable or reasonable to the City of Pocatello and its inhabitants, and that it is the right and duty of this body to have a commission appointed pursuant to the provisions of Sec. 2839, Idaho Revised Codes, to fix and determine the rates to be charged for water and water service to the City of Pocatello, and its inhabitants by said James A. Murray:

Therefore, be it resolved that J. H. Townsend and W. P. Havenor, tax payers of the City of Pocatello, Bannock County, Idaho, be and they are hereby appointed by the City of Pocatello, Bannock County, Idaho, as Commissioners to act in conjunction with other commissioners to be appointed pursuant to the provisions of Section 2839 Idaho Revised Codes, to fix and determine the rates to be charged for water and water service, both public and private, in the City of Pocatello, Bannock County, Idaho, as therein provided.

Be it further resolved that James A. Murray be given the notice provided by said Section 2839 of the appointment of said two commissioners as provided herein, and that demand be made upon him that he at once and within thirty days after said demand appoint a like number of commissioners to act in conjunction with those hereby appointed, and pursuant to the provisions of said Section 2839 Idaho Revised Codes.

Dated at Pocatello, Idaho, this 6th day of July, 1911.

J. M. BISTLINE, *Mayor.*

Attest:

FINN H. BERG, *Clerk.*

I, Finn H. Berg, Clerk of the City of Pocatello, Bannock County, Idaho, do hereby certify that the foregoing is a true and correct copy of a resolution passed at a regular meeting of the City Council of the City of Pocatello, Bannock County, Idaho, held on the 6th day of July, 1911.

Witness my hand and seal this the 10th day of July, A. D. 1911.

FINN H. BERG,  
City Clerk.

Indorsed: Filed Sept. 25, 1911. I. W. Hart, Clerk.

25 (Title of Court and Cause.)

*Amendment to Affidavit for Writ of Mandate.*

Comes now the City of Pocatello, a municipal corporation, and by leave of court first had and obtained files this its amendment to the affidavit for writ of mandate of J. M. Bristline heretofore filed herein in plaintiff's behalf, and designates this amendment as paragraph "1a" of said affidavit.

STATE OF IDAHO,  
County of Bannock, ss:

J. M. Bistline, being first duly sworn deposes and says:

1a.

That this affidavit and application for a writ of mandate is presented originally to this court and not to the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, for the reason that the Honorable Alfred Budge, Judge of said District Court, is a resident and property owner within the said City of Pocatello, and a user of water from the waterworks and system owned by the said defendant, James A. Murray, doing business as the Pocatello Water Company, and as such patron of said water company has been and is subject to the rates specified in Ordinance No. 86 of the City of Pocatello, hereinafter particularly referred to and set forth: and affiant avers that the said Honorable Alfred Budge has stated to counsel for the City of Pocatello that it is his opinion that under the circumstances he would be disqualified from hearing an application affecting the question of rates for water such as has been filed herein; affiant further avers that the matter  
26 herein involved is of great public importance as it concerns and affects the said City of Pocatello, and the inhabitants thereof upon the question of the charges for water supplied to them by said defendant, and that it is essential and highly necessary that the matters hereinafter set forth be adjudicated at the earliest possible date without the necessity of the delay which would probably occur in securing a district judge other than the Honorable Alfred Budge to hear and determine the questions involved. For the foregoing

reasons affiant avers that it is indispensable that the application and affidavit for writ of mandate should be presented originally to this court and that the writ of mandate prayed for should issue originally therefrom.

[SEAL.]

J. M. BISTLINE, *Mayor*.

Subscribed and sworn to before me this 2d day of December, 1911,

P. C. O'MALLEY,  
*Notary Public*.

Endorsed: Filed December 11, 1911. I. W. Hart, Clerk.

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(Title of Court and Cause.)

*Alternative Writ of Mandate.*

The People of the State of Idaho to James A. Murray, doing business as "Pocatello Water Company," defendant above named, Greeting:

Whereas, it manifestly appears to us by the affidavit of J. M. Bistline made and filed herein on behalf of the plaintiff, The City of Pocatello, the party beneficially interested, that on the 6th day of July, 1911, said plaintiff by resolution duly passed by its City Council declared that the rates and charges for water furnished to said city and the inhabitants thereof by you the said defendant is unfair, unreasonable and unjust, and that said City Council on said date by resolution duly appointed two commissioners, taxpayers of said city of Pocatello, to act with commissioners to be appointed by you the said defendant to fix and determine the rates to be charged for water and water service furnished by you to said city and its inhabitants, and

Whereas, it further appears that notice of the appointment of said commissioners by said City of Pocatello was within the time fixed by law duly served upon you together with a request that you appoint two commissioners, tax payers of said City of Pocatello

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to act with the said commissioners so appointed by said City of Pocatello to fix and determine the rates to be charged for

water furnished to said city and its inhabitants by you the said defendant, and

Whereas, it manifestly appears that you have failed, refused and neglected and still fail, refuse and neglect to appoint said commissioners in accordance with said request of said City of Pocatello and as provided by Section 2839 of the Revised Codes of Idaho, 1909, and that there is not a plain, speedy or adequate remedy for the plaintiff in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this writ you do appoint two commissioners, tax payers of the City of Pocatello, to act with said commissioners heretofore appointed by said City of Pocatello to fix and determine the rates to be charged for water furnished by you to said city and to the inhabitants thereof,

or that you show cause before this court at the court room thereof in the City of Boise on the 4th day of December, 1911, at the hour of 10 o'clock A. M. of said date, why you have not done so.

Let due service hereof together with copy of said affidavit be made upon the persons to whom this writ is hereinabove directed, without delay.

Witness the Honorable Geo. H. Stewart, Chief Justice of the Supreme Court of the State of Idaho, in the City of Boise, County of Ada, and the seal of said court this 25th day of September, 1911.

[SEAL.]

I. W. HART, *Clerk.*

29

(Title of Court and Cause.)

*Demurrer to Petition and Affidavit.*

Comes now the defendant, James A. Murray, by his counsel, and demurs to the petition and affidavit heretofore filed in this court in the above entitled cause and as grounds of demurrer states:

1.

That the said affidavit and petition does not state facts sufficient to constitute a cause of action.

2.

That the said affidavit and petition does not state facts sufficient to entitle plaintiff to the appointment of commissioners or to the, or any, relief as demanded in the petition.

3.

That it appears from the allegations and said affidavit and petition that this court is without jurisdiction of the person of the defendant.

4.

That it appears by the said petition and affidavit that this court is without jurisdiction over the subject matter of this suit.

GEO. E. GRAY,

N. M. RUICK,

*Attorneys for Defendant, James A. Murray.*

Endorsed: Filed Dec. 4, 1911. I. W. Hart, Clerk.

(Title of Court and Cause.)

*Motion to Quash Alternative Writ.*

Comes now the defendant, James A. Murray, by his counsel, and moves to quash the alternative writ of mandate heretofore issued in the above entitled proceeding upon the grounds:

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1.

That the said affidavit and petition does not state facts sufficient to constitute a cause of action.



## 2.

That the said affidavit and petition does not state facts sufficient to entitle plaintiff to the appointment of commissioners or to the, or any, relief as demanded in the petition.

## 3.

That it appears from the allegations of said affidavit and petition that this court is without jurisdiction of the person of defendant.

## 4.

That it appears by the said petition and affidavit that this court is without jurisdiction over the subject matter of this suit.

## 5.

That the said affidavit and petition fails to show that plaintiff has complied with the conditions of the ordinance and contract set out in the complaint to entitle it to the, or any, relief, as prayed for.

## 6.

That it appears from the said affidavit and petition that the act of the Legislature upon which plaintiff relies in this proceeding in its demand for the appointment of commissioners to fix water rates was enacted subsequent to the passage and approval of the ordinance set out in said affidavit and petition and was also subsequent to the acceptance of the conditions of said ordinance by this defendant; that, as to the said contract, said statute of Idaho is ineffective, inoperative and void and that the application of the same, as prayed for in this proceeding requiring defendant to appoint commissioners for the purpose of fixing water rates to be charged under the terms of the said ordinance referred to, is contrary to and in contravention of the Constitution of the United States, Article I. Section 10, which provides that no state shall pass any law impairing the obligation of any contract; as also contrary to and in contravention of the fourteenth amendment to the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

GEO. E. GRAY,  
N. M. RUICK,

*Attorneys for Defendant, James A. Murray.*

Endorsed: Filed Dec. 4, 1911. I. W. Hart, Clerk.

(Title of Court and Cause.)

*Answer of James A. Murray.*

The defendant, for answer to the affidavit and petition for peremptory writ of mandate heretofore filed by plaintiff, the City of Poca-

tello, in the above entitled action in the above named court, makes this his answer and return to the alternative writ of mandamus heretofore issued therein, and admits, denies and alleges as follows:

1.

Admits the allegations of Paragraph 1 of said affidavit and petition.

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2.

Admits the allegations of Paragraph 2 of said affidavit and petition.

3.

Defendant admits the allegations of Paragraph 3 of the Complaint and alleges that not only did he assume to act in accordance with the provisions of the Ordinance in said Paragraph referred to, but that he has at all times acted, and is still acting, in accordance therewith.

4.

Defendant admits the service upon him of the notice as and on the date alleged in Paragraph 5 of said affidavit and petition.

5.

Defendant admits that he has failed, refused and neglected to appoint commissioners in accordance with said, or any, notice so served upon him, as alleged in said complaint, and that he still refuses to appoint such, or any, commissioners referred to in said notice and admits that, as such Pocatello Water Company, he continues to charge for water and water service, both public and private, in accordance with the schedule set forth in said ordinance, No. 86, referred to in said affidavit and petition, and admits that his refusal to appoint said, or any, commissioners is based upon the provisions of the said ordinance referred to and the rights of this defendant thereunder, and defendant denies that he is required by the statutes to appoint said, or any, commissioners in accordance with the notice in said affidavit and petition referred to.

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6.

Denies that the schedule of rates and charges, or rates or charges, set forth in said ordinance is unreasonable, unjust, inequitable and oppressive, or that the same is unreasonable or unjust or inequitable or oppressive, and denies that plaintiff has no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, etc.

II.

For a further defense to said application for writ of mandate, this defendant respectfully shows:

## 1.

That, at all the times hereinafter mentioned, he was, and now is, a citizen and resident of the State of Montana; that, prior to and ever since the 6th day of June, 1901, he has owned and, as and under the business name of Pocatello Water Company, has operated a water system and plant in the City of Pocatello, Bannock County, State of Idaho, for the purpose of supplying the plaintiff, said City of Pocatello, and its inhabitants with water for domestic uses and for the extinguishment of fires and sprinkling of streets, under and by virtue of the provisions of an ordinance of said city duly passed and approved on said June 6th, 1901, a copy of which ordinance is hereunto annexed, marked "Exhibit A" and made a part hereof; that the plaintiff herein is a city of the second class organized and existing under and by virtue of the laws of the State of Idaho; that the matter in dispute in this suit, exclusive of interests and costs, exceeds the sum or value of Two Thousand Dollars.

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## 2.

That heretofore, to-wit, on the 4th day of January, 1892, the said plaintiff being then a village organized and existing under the laws of Idaho, by Ordinance, conferred upon, and granted to, defendants' predecessors in interest, their associates, successors and assigns, the right, authority, privilege and permission to construct, maintain and operate a system of water works in said village of Pocatello, and a right-of-way over, along and under the streets, alleys and public highways within the corporate limits of said village, for a period of fifty years, for the purpose of laying water mains, pipes, and conduits for the furnishing and supplying of the said village of Pocatello, and the inhabitants thereof, with a supply of pure and healthful water upon certain conditions precedent to said grant; that the defendant's said grantors fully complied with said conditions precedent and thereby obtained certain vested rights under said grant; that, heretofore and prior to the date of the ordinance hereinafter referred to, to-wit, prior to the 6th day of June, 1901, this defendant succeeded to all the right, title, interest and possession of the parties named in said original grant and ever since has been, and now is, the sole and exclusive owner of all rights, franchises and privileges secured to defendants' predecessors in interest by virtue of the grant referred to.

## 3.

That prior to the date last hereinbefore referred to, to-wit, prior to June 6, 1901, the plaintiff, City of Pocatello, became and was duly organized as a city of the second class under the laws of the State of Idaho, and as such became, and ever since has been and now is, the legal municipal successor of said village of Pocatello.

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## 4.

That, on or about September 1, 1896, certain rates and charges for water and water service to be rendered by defendants' prede-

cessors in interest as the Pocatello Water Company, Limited, a corporation, then the owner and holder of the privileges, rights and franchises hereinbefore referred to, were agreed upon with said village of Pocatello, which said rates were confirmed and continued by the provision of an ordinance of said village approved June 8, 1898.

## 5.

That, on and prior to June 6, 1901, the said plaintiff herein, the City of Pocatello, deeming the supply of water furnished by said water system, as then constituted and constructed, inadequate for the then present and future needs of said City of Pocatello, entered into negotiations with this defendant for the purpose of procuring an additional and adequate supply of water for such needs and for the purpose of procuring immediate, and providing for future, extensions of the water system of said Pocatello Water Company as should be warranted by the growth and increase in the population of said City of Pocatello,—such increase and extension necessitating the construction of additional reservoirs, the procurement of additional water supply, the extension of water mains and a large expenditure of money. That this defendant, being willing to make such extensions and to expend the money necessary to provide such additional and adequate water supply, demanded of said City

36 that, before making such extensions and incurring such additional outlay, and as a condition precedent thereto, the said City of Pocatello should give this defendant guarantees against unreasonable or arbitrary changes in the rates and charges for water and water service to be supplied and rendered by the said Pocatello Water Company and an assurance that unreasonable or arbitrary changes in such water rates should not be made, but that alterations and changes in rates should be made in a manner to be specified and provided for in an ordinance of said City.

## 6.

That the said plaintiff, City of Pocatello, considering said proposals and demands of this defendant, as hereinbefore set out, to be just and reasonable, and deeming and deciding it to be for the best interests of said city and its inhabitants to give the assurance and guarantee in that behalf, demanded by this defendant, as such Pocatello Water Company, did, heretofore, to-wit, on the said 6th day of June, 1901, pass, in due form, an ordinance which was then and there, in due form, approved by the Mayor of said City, which ordinance is still in force and effect, confirming and continuing unto this defendant, as successor in interest to the parties named in said original ordinance of the Village of Pocatello, as hereinbefore set out and referred to, the rights and privileges by such village ordinance conferred, and made a contract by and on behalf of the said City of Pocatello, and the inhabitants thereof, with this defendant for supplying said city with water for public and private uses, fixing the rates to be charged for water, providing a means of ascertaining the value of such water system as a basis for

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readjusting rates in the future or in the event of a sale; providing the manner and means for readjusting and fixing such rates, and waiving the right of said City to build, own or acquire a competitive water system, except under the conditions stated in said Ordinance, or of granting to others franchises, privileges, terms or conditions more favorable than those granted to and held by this defendant.

7.

That, by said ordinance last hereinbefore referred to, it was declared that the rates theretofore agreed upon between the village of Pocatello and the Pocatello Water Company, Limited, a corporation, the predecessor in interest of this defendant, were and are fair, equitable, reasonable and just, and that the same should continue in full force and effect within the said City of Pocatello, and the said City, by said Ordinance of June 6, 1901, expressly agreed and declared that the schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company to the said City of Pocatello and the inhabitants thereof, theretofore fixed and adopted as hereinbefore in this answer referred to, and at the time of the passing of the ordinance of June 6, 1901, in full force and effect within the said City of Pocatello, were and are fair, equitable, reasonable and just, and should continue to be the schedule of rates and charges for water and water service to be charged by this defendant as such Pocatello Water Company, as specified in said Ordinance last hereinbefore referred to; and the said plaintiff, City of Pocatello, by said ordinance of June 6, 1901, then and there fixed, adopted and established a schedule of rates to be charged by this defendant as such Pocatello Water Company for water furnished and to be furnished said City of Pocatello and the inhabitants thereof, as specified and contained in the ordinance, a copy of which is attached hereto and made a part hereof; that the rates so fixed, adopted and established have ever since continued to be and now are in full force and effect. Defendant further shows and alleges that the said rates and charges were then and there, by said ordinance last hereinbefore referred to, adopted by the said City of Pocatello for itself and as trustee for the use and benefit of all private consumers of water within the corporate limits of said City for a period of five years from and after the passage and approval of the same, to-wit, within five years after June 6th, 1901.

8.

It was further provided in said ordinance that, at the expiration of said period of five years, if the earnings of said water system should exceed five per cent. above reasonable expenses upon the value of said water system, as such value might be agreed upon or ascertained in the manner provided for therein, then the rates so established by said ordinance might be readjusted so as not to yield less than five per cent. above reasonable expenses on the valuation so agreed upon or so to be ascertained as therein provided, but that no

readjustment of rates should thereafter be made which should yield this defendant, as such Pocatello Water Company, less than five per cent. above reasonable expenses on the value of the said water system agreed upon or ascertained, as provided in said ordinance; that, if, at the expiration of five years from and after the passage of said ordinance, or any time thereafter, it should be deemed necessary to readjust the rates under the provisions of said ordinance, and if the City of Pocatello and the said James A. Murray, the defendant herein, or his successors or assigns, could not agree upon the value of the said water system for the purpose of readjusting rates, as therein provided, then the value of the said water system should be ascertained and determined as follows: A committee of four experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, should be selected, two by the City of Pocatello and two by this defendant, his successors or assigns, and if a majority of the four thus chosen could not agree, they should select a fifth, and, if they could not agree upon the fifth, they should request the President of the American Society of Civil Engineers to appoint the fifth member. The decision of a majority of those so selected should fix the value of said water system as a basis and for the purpose of readjusting said rates, and that such decision should be final.

### 9.

Said ordinance further provided that the said City of Pocatello should not, after the date of the passage thereof, grant to any individual, corporation, or association, terms or franchises for the construction or operation of a water system in and for the City of Pocatello more favorable than the terms and franchises so held by, granted, confirmed and continued to this defendant, and that the said City should not build, acquire, own or operate a water system of its own until it had in good faith offered to purchase said water system of this defendant at a price to be ascertained and fixed,—if the owner of said water system and the said City of Pocatello could not agree upon the same, by a committee of hydraulic engineers, who must be members of the American Society of Civil Engineers to be selected in the manner provided for by Section 4 of said ordinance, and as hereinbefore set forth, who should fix the value of said water system for the purpose of such sale, and that the decision of the majority of such a committee should be final; that, at intervals of five years from the approval of said ordinance, to-wit, June 6, 1901, and during a period of ninety days immediately following the completion of each five year interval, the City might purchase said water system under the conditions thus specified, but at no other time except by mutual consent of the City and the owner of said water system; that, in the event of the said City purchasing the same, pursuant to said ordinance, this defendant should transfer all his right, title and interest in and to the said property to the said City and the said City should receive and pay for the whole plant,—this defendant thereupon to deliver possession of the same to said City.

## 10.

Said ordinance further provided that, within ninety days from and after the passage and approval thereof, this defendant should commence or cause to be commenced the improvements mentioned therein and should carry the same to completion without  
41 unnecessary delay and that a compliance with the terms of said ordinance, should entitle this defendant, his successors or assigns, to the benefits of its provisions as and by virtue of an executed contract; but that, if more than ninety days should elapse without such commencement of the said improvements, said ordinance should be declared, and be, null and void; said ordinance further provided that, in consideration of the improvements to be made as named therein, the said City of Pocatello should rent, receive and pay for not less than forty-five hydrants, at the rate named therein; and said city agreed, by said ordinance, to designate points on the water mains where extra hydrants should be placed,—the same to be subject to payment of rent from and after date of their being placed in position.

## 11.

Said ordinance further provided that, if this defendant, his successors or assigns, failed to supply sufficient water for the needs of the City of Pocatello and the inhabitants thereof, then it should be optional with said City to secure a further supply of water from other sources, but that this defendant should have a reasonable time in which to complete the improvements contemplated in and provided for by said ordinance, and such further improvements as might thereafter become necessary, to supply sufficient water in compliance with the provision last hereinbefore stated.

## 12.

Further answering, defendant avers that he forthwith accepted the said ordinance, together with the rights, franchises and privileges therein and thereby granted and all the terms and conditions thereof, and thereafter and within the time fixed therein, he commenced construction of the improvements and extensions mentioned therein, and proceeded without unnecessary delays or interruptions to prosecute the work thereon until finally completed, and in so doing expended large sums of money, aggregating Two Hundred Thousand Dollars and upwards; such extensions and improvements consisting of the construction of an additional reservoir, the improvement and enlargement of a reservoir already in use, whereby its capacity was doubled, the construction of a diversion dam and valvehouse, and the laying of seven miles of pipe to convey an additional quantity of water from a new and additional source of supply to the reservoirs of the company, thus doubling the quantity of water available at seasons of low water; the laying of new and additional water mains,—substantially doubling the mileage already laid; the installation of new fire hydrants of the number of twenty or more,—nearly doubling the number previously in use in said City.

That such extensions and improvements were completed in due course and in accordance with the terms of said ordinance, including the further extensions and improvements provided for in said ordinance to be made as the growth of population and the needs of said City and its inhabitants required.

## 13.

Defendant further avers that he has, at all times and in all respects, complied with the terms and provisions and conditions of said ordinance, thereby entitling him to the enjoyment and possession of all the rights, franchises and privileges provided by said ordinance and granted to this defendant therein and thereby, and that he ever since has continued in the possession and ownership of said water system, as so extended and improved, and has continued to operate the same and to charge and receive from the said City of Pocatello and the inhabitants thereof the rates and charges for water and water service, as in said ordinance provided, and, in all respects in accordance with the terms thereof; that said City of Pocatello, plaintiff herein, has made no request of or demand upon this defendant for a readjustment of said water rates under the provisions of said ordinance, nor for the appointment of a committee or members of a committee, provided for in section 4 of said ordinance, for the purpose of determining the value of said water system as a basis for the readjustment of the rates and charges provided therein.

Defendant avers that, notwithstanding the earnings of said water system have at no time since the passage of said ordinance equalled five per cent. per annum, above reasonable expenses, upon the value of said water system, he has been, at all times since the expiration of five years from and after the passage of said ordinance, and now is, ready and willing to appoint members of a committee, under and pursuant to and as provided in said ordinance, for the purpose of acting with such as shall be appointed or selected by said City, under the terms of said ordinance, to constitute a committee for the purpose of determining the value of said water system, as a basis

44 for a readjustment of such water rates; and, in the event that the earnings of said water system shall exceed five per cent. above reasonable expenses upon the value of said water system as ascertained by said committee, to agree upon new rates to be adjusted so as to yield not less than five per cent. per annum above reasonable expenses on the value of said water system so ascertained, as provided by said ordinance.

## 14.

Defendant is informed and believes and, therefore, on information and belief, avers that the said City of Pocatello, purporting to act by and through its city council, did heretofore, to-wit, on or about the 6th day of July, 1911, pass a resolution to the effect that the schedule of charges for water and water service, both public and private, supplied and furnished to said City of Pocatello and its inhabitants by this defendant is not fair, equitable or reasonable and



that a commission should be appointed pursuant to the provisions of Sec. 2839, Revised Codes of Idaho, 1909, to fix and determine the rates to be charged for water and water service to said city and its inhabitants; that it was further resolved that two commissioners, in said resolution named, tax-payers of the said city of Pocatello, be and the same were by said resolution appointed by said plaintiff, city of Pocatello, as commissioners to act in conjunction with such commissioners as this defendant might appoint pursuant to the provisions of said Sec. 2839 of the Revised Codes of Idaho, for the purpose of fixing and determining the rates to be charged by defendant for water and water service, both public and private, in said city; that it

45 was further resolved by said City Council of said City of Pocatello that this defendant be notified pursuant to the provisions of said Sec. 2839 of the appointment of said commissioners by the City of Pocatello and the demand be made upon him that, within thirty (30) days thereafter, he appoint a like number of commissioners to act in conjunction with those appointed by the said City pursuant to the provisions of the section of the law referred to.

15.

Defendant further avers that, heretofore, to-wit, on the 15th day of July, 1911, the said City of Pocatello, plaintiff herein, caused to be served upon this defendant a paper, purporting to be a notice, addressed to him and notifying him of the appointment by the plaintiff of two commissioners, and requesting defendant to appoint two commissioners to act for him, this defendant, under the provisions of Section 2839 of the Revised Codes of Idaho, which provisions of the laws of the State of Idaho are as follows, to-wit:

"SEC. 2839. All persons, companies, or corporations supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water, may, from time to time, establish and at such rates as established in the manner hereinafter specified:

46 and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified.

The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the town or city authorities, or when there are no town or city authorities, then by the board of county commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; said town or city authorities must, within ten days after the appointment of the two commissioners so selected, give notice in writing to said person, company, or corporation supplying water, of the appointment of such commissioners, and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or city, must be selected by the person, company or corporation supplying water, and in case a majority of the four commissioners so selected cannot

agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or city, and if they cannot agree upon a fifth commissioner, then the probate judge of the county, must, within ten days after notice to him by said commissioners, that they are unable to agree upon a fifth commissioner, select a fifth commissioner qualified as aforesaid. The decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date

of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days from the date of such board of water commissioners is complete: Provided, That any person, company or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, That nothing in this section contained shall relieve said town or city authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a franchise to any person, company, or corporation to supply water as aforesaid: Provided, further, That said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one-half of said sum to be paid by the town or city, and one-half by such person, company, or corporation supplying water; Provided, further, That said commissioners shall be empowered to incur any other expense that may be necessary to aid them in establishing such water rates, and one-half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

That said law of the State of Idaho hereinbefore referred to and upon which plaintiff relies in this proceeding is an Act of the Legislature of the State of Idaho, approved March 16, 1907, (Laws 1907, p. 555), entitled "An Act to Amend Section 2711 of the Revised Statutes of the State of Idaho, as amended by an Act approved March 9, 1905," (Laws 1905, p. 192) and, subsequently, by an Act of the Legislature of said State, re-enacted as Section 2839, Revised Codes of the State of Idaho. That said law was enacted and came in force and effect subsequent to the passage and approval of said ordinance on June 6, 1901, and subsequent to the acceptance of the provisions thereof by this defendant and to the making of the improvements hereinbefore referred to.

That the resolution and action of the city council of said city of Pocatello, hereinbefore referred to, and said notice was, as this defendant is informed and believes and therefore on information and belief avers, for the purpose of inducing and requiring this defendant to appoint commissioners to act in conjunction with commissioners already appointed by said City in determining rates to be charged for water supplied the said City of Pocatello and the inhabitants thereof by and through the water system theretofore constructed and now owned and operated by this defendant pursuant

to the provisions of the ordinance of the City of Pocatello hereinbefore referred to, and that such request and demand for the appointment of commissioners was not made nor intended, nor designed, to be made under or pursuant to, or in accordance with, the provisions of said ordinance but in disregard thereof, and that the said City of Pocatello bases such demand for the appointment of commissioners wholly and solely upon the provision of the Laws of Idaho hereinbefore referred to and set out; and that said city maintains and contends that, notwithstanding the provisions of  
49 said ordinance, and without regard thereto and contrary to the terms and provisions thereof, the said City of Pocatello is entitled to have the rates to be charged for water furnished to the said City and its inhabitants fixed and determined by commissioners selected as provided in the law referred to.

## 16.

Defendant avers that he has heretofore refused, and still refuses, to appoint commissioners as requested and demanded by said City, basing such refusal upon the terms, conditions and provisions of the ordinance of the said City of Pocatello hereinbefore referred to; and avers that the action and proceeding so proposed and attempted by said City in setting aside and ignoring the provisions of said ordinance relative to ascertaining and fixing the value of the said water system as a condition precedent and preliminary to a readjustment of rates to be charged public and private consumers of water, constitute an attempted breach of the contract heretofore entered into between said City of Pocatello and this defendant by virtue of the acceptance by this defendant of the terms and conditions of the ordinance No. 86 hereinbefore referred to, and defendant further says that the said law of the State of Idaho hereinbefore referred to and quoted, and upon which plaintiff relies in this proceeding, and upon which plaintiff bases its demand for the appointment by defendant of commissioners to determine the rates to be charged for water, is, as to the said ordinance and contract hereinbefore referred to, inoperative, unconstitutional and void, and is contrary to  
50 and in contravention of the provisions of the constitution of the United States, Art. one (1), Section Ten (10), which provides that no State shall pass any law impairing the obligation of contracts; as also contrary to and in contravention of the fourteenth amendment to the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

Wherefore, etc.

## III.

For a further and separate answer to the affidavit and petition for writ of mandate herein, defendant avers:

## 1.

That the matters and things referred to in said petition and affidavit for writ of mandate have heretofore been in issue, and liti-

gated and determined in a court of competent jurisdiction by and between the parties to this proceeding, and that the judgment therein has not been set aside or annulled and the same is in full force and virtue:—the facts relative to such former adjudication being as follows:

## 2.

That, heretofore, to-wit, on the 19th day of January, 1909, the said City of Pocatello filed its bill of complaint in the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho, against this defendant, James A. Murray, doing business under the name of the Pocatello Water Company at Pocatello, Idaho, in which bill of complaint, the said plaintiff alleged in substance that this defendant—defendant named in said bill—had, during all  
51 the times mentioned therein, been doing business in said city of Pocatello under the name and style of the Pocatello Water Company; that defendant, his grantors and predecessors in interest were, and the defendant then was, the owner, in possession of and operating a water works plant and water system for supplying the city of Pocatello and the inhabitants thereof with water for public and private purposes; that defendant was operating said water system under and by virtue of a franchise granted him by the City of Pocatello under and by virtue of an ordinance, No. 86, of said city, which ordinance, it was alleged, confirmed and continued to the defendant certain privileges and franchises theretofore granted to other parties (naming them), and that this defendant, as the legal successor of said parties, made a contract with said City of Pocatello for supplying said city with water for public and private use; that said ordinance fixed the rates to be charged for water, provided a means of ascertaining the value of said water system as a basis for readjusting rates for the future and in the event of a sale and waived the right on the part of the city to build, own or acquire a competitive water system except under certain conditions and waived the right of said city to grant to others franchises more favorable than those then held and granted to said defendant; that said ordinance, No. 86, duly and regularly passed and approved on June 6, 1901, at all times thereafter, continued in full force and effect,—and a copy of said ordinance was attached to said bill of complaint, being the same ordinance contained and embodied in "Exhibit A," attached to this answer, referred to herein and forming a part hereof.

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## 3.

Said bill further alleged that this defendant, James A. Murray, defendant in said action, immediately upon the passage and approval of said ordinance, accepted the same and the franchise granted thereunder and thereby with all the terms and conditions thereof and that, at all times since the date of the passage of said ordinance, had operated and was then, at the time of the filing of said Bill of Complaint, operating said water plant and system by virtue of the provisions of said ordinance and not otherwise.

## 4.

Said Bill further alleged that more than five (5) years (the period stated in said ordinance during which the rates then established should continue in force and in effect) had elapsed since the passage of said ordinance and that, under the laws of the State of Idaho, said plaintiff, City of Pocatello, was entitled to have a new schedule of water rates and charges fixed; that the schedule of rates and charges fixed by said ordinance, No. 86, on June 6, 1901, had ceased to be reasonable and proper and were no longer a just measure of amounts that ought to be paid to defendant for water furnished under said franchise and that the said rates so fixed had then become and were excessive, extortionate and oppressive in each and every instance; that, under and by virtue of an act of the Legislature of the State of Idaho, approved March 16th, 1907, amending section 2711 of the Revised Statutes of Idaho, as amended by an act of March 9, 1905, said plaintiff was entitled to have the rates to be charged for water determined by commissioners  
53 to be selected as provided in said act; that said City of Pocatello, on July 20, 1908, had, by resolution declared said rates to be unreasonable and appointed two commissioners to act on behalf of the city with such as might be appointed by defendant for the purpose of determining the rates to be charged for water under and pursuant to the provisions of the act of the Legislature referred to and that thereafter a demand was served upon defendant by and through one George Winter, Superintendent of said Water Company and the representative of defendant, requiring him to appoint two commissioners to join with the commissioners theretofore appointed by plaintiff to fix rates and charges for water to be supplied by defendant under his said franchise.

## 5.

Said Bill further alleged, in substance, that defendant had wholly failed, neglected and refused to appoint commissioners under the said law of the State of Idaho therein, and hereinbefore, cited, and referred to, and still continued to refuse so to do or to join with plaintiff, as required by said law, in fixing and providing new rates and charges for furnishing water to said city and the inhabitants thereof under his said franchise, and that he had, by said refusals, incurred the penalty provided in said Act.

A copy of the Bill of Complaint in said action is hereunto annexed, marked "Exhibit B" and made a part of this answer.

## 6.

54 That, thereafter, this defendant, as defendant in said action, joined issue therein by the filing of a demurrer to the bill of complaint therein, alleging, among others, as grounds of demurrer, that complainant therein had not made or stated in said bill such a cause as entitled it in a court of equity to relief against defendant as to the matters set forth in said Bill or any of said matter.

A copy of said demurrer is hereto annexed, made a part of this paragraph of answer, marked "Exhibit C."

## 7.

That, thereafter, said cause came on to be heard before the said Circuit Court of the United States for the District of Idaho, upon the Demurrer so interposed by defendant to said bill and, the Court being fully advised in the premises, sustained said demurrer and ordered said Bill dismissed; which order and judgment was duly entered of record in said cause and said bill dismissed; that a copy of the judgment and decision, and of the opinion of the court, in said cause are hereto annexed, made a part of this answer, and marked, respectively, "Exhibits D and E."

That said judgment has not been set aside nor appealed from and the same is still in force and effect.

## IV.

For a further and separate answer, this defendant avers:

## 1.

That there is another action between the same parties, pending in the Circuit Court of the United States for the District of Idaho, Eastern Division, wherein the plaintiff in this proceeding is plaintiff and the defendant herein is defendant, in which action the validity and effect of the ordinance, No. 86, referred to in the petition and affidavit for writ of mandate herein and hereinbefore in this answer referred to is directly in issue,—said City of Pocatello, plaintiff in both actions, alleging and maintaining in the other action referred to, that the franchise granted this defendant by said Ordinance No. 86, heretofore and on June 6th, 1901, passed by the said City of Pocatello and approved by its Mayor,—being "Exhibit A" attached to this answer and made a part of this paragraph,—had been forfeited and had become void and — none effect, by reason of the failure of the defendant in said action, James A. Murray, sole defendant herein, to comply with the terms, conditions and provisions thereof.

## 2.

That said action last hereinbefore referred to was begun in the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County, by the filing of a complaint therein on August 21st, 1911; that a summons was thereupon issued and served upon said defendant named therein at the City of Butte, State of Montana; that defendant appeared in said action on the 6th day of September, 1911, and on October 18th, 1911, filed his answer denying each and every of the material allegations of said complaint; that, at the same time and within the time allowed by law therefor, defendant filed his petition and bond in due form and prayed the removal of said cause from the said District Court in and for Bannock County to the Circuit Court of the United States in and for the District of Idaho;—which petition and bond were accepted and approved and the said cause was

thereupon ordered by said Court to be removed, and was removed, into the said Circuit Court of the United States for the District aforesaid; that said cause is now pending in said court undisposed of and no decision or determination has been had of the matters and things in issue under the pleadings in said cause.

That a copy of the complaint in said action is hereto attached, made a part of this paragraph of answer and marked "Exhibit F."

Wherefore, defendant prays:

1.

That plaintiff take nothing by this action or proceeding, but that the same may be ordered dismissed and the peremptory writ of mandate denied, and that this defendant have judgment for his costs.

2.

That it be adjudged that the matters and things set out in the petition and affidavit for writ of mandate herein have been heretofore determined by the order, judgment and decree of a court of competent jurisdiction and are *res judicata*.

Defendant prays for such further order in the premises as to the court may seem just and as the facts may warrant.

GEO. E. GRAY,  
*Residence, Pocatello, Idaho;*  
N. M. RUECK,  
*Residence, Boise, Idaho;*  
*Attorneys for Defendant.*

(Duly verified.)

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EXHIBIT A.

Copy of Ordinance No. 86 of the City of Pocatello, being identical with Exhibit A attached to Affidavit for Writ, pages 5-14, folios 13 to 42.

"EXHIBIT B."

*Bill of Complaint.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho,

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs.

JAMES A. MURRAY, Doing Business under the Name of Pocatello Water Company at Pocatello, Idaho, Defendant.

To the Judges of the Circuit Court of the United States for the District of Idaho:

The City of Pocatello, a municipal corporation, of Pocatello, and a citizen of the State of Idaho, brings this bill against James A. Murray, of Butte City, and a citizen of the State of Montana.

And thereupon your orator complains and says:

1.

That at all the times mentioned in this bill of complaint, the plaintiff, the City of Pocatello, was, and now is, a public municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho relating to the creation and government of cities and villages in said State, and had adopted and now has, a City Government, together with the duly elected, qualified and acting officers provided by law for a city of the second class, and  
58 with its locus within the territorial limits of the County of Bannock, in said State of Idaho; and that at the commencement of this action the said city of Pocatello was, and now is, a citizen of the said State of Idaho.

2.

That the defendant named above, James A. Murray, is a citizen of the State of Montana, and customarily has, keeps and maintains his residence at Butte City, in the County of Silver Bow, in the said State of Montana, and at the commencement of this action was, and now is, a citizen of the said State of Montana.

3.

That at all the dates and times mentioned in this bill of complaint the defendant was, and now is, doing business in said City of Pocatello, in the said County of Bannock, and State of Idaho, under the name and style of the Pocatello Water Company.

4.

That the defendant, James A. Murray, and his grantors and predecessors in interest, at all the times mentioned herein were, and the defendant now is, the owner, and in the possession and operating a certain water-works plant and water system, which supplies the said City of Pocatello and the inhabitants thereof with water for public and private purposes; that said water-works plant and water system consists of reservoirs, which are filled with the waters of certain mountain streams in said Bannock County, a pipe line or lines tapping said reservoirs and leading to trunk water-mains and  
59 laterals, which said water-mains and laterals run through and along all of the principal streets and thoroughfares of said City of Pocatello, connect with the private pipes, hydrants and premises of the inhabitants of said city, and with public buildings therein and supply water for public and private consumption, and for garden and irrigation purposes; that to and with said water-mains and laterals there are connected about fifty-three fire-hydrants for furnishing water for fire purposes, street sprinkling, and other public purposes and that said water-works plant and water system is the only one in existence in said city.



## 5.

That the defendant, at all the times mentioned herein, was, and now is, operating said water-works plant and water system under and by virtue of a certain franchise granted him by the Mayor and Council of the City of Pocatello in form and manner as prescribed by law, and more particularly under and by virtue of what is known in the archives of said city as Ordinance No. 86, which said ordinance was and is entitled, 'An Ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Custick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use, fixing the rates to be charged for said water, providing a means of ascertaining the value of said water system, as a basis of re-adjusting rates in the future, or in the event of a sale, and waiving the right on the part of the city to

60 build, own or acquire a competitive water system except under stated conditions, or of granting to others more favorable terms of franchises than now held and granted to said James A. Murray, which said Ordinance No. 86 was duly and regularly passed and enacted by the Council of said City of Pocatello on the 6th day of June, 1901, and thereafter duly and regularly approved by the then duly elected, qualified and acting Mayor of said City of Pocatello on the said 6th day of June, 1901; that said Ordinance No. 86 at all the times mentioned in this bill of complaint was, and now is, in full force and effect; that a true copy of said Ordinance No. 86 is hereto attached, marked "Exhibit A," and the same is hereby referred to in this connection, and made a part of this bill of complaint.

## 6.

That the defendant, James A. Murray, immediately upon the passage and approval of said Ordinance No. 86, accepted the same, and the franchise granted thereunder and thereby and all of the terms and conditions thereof, and at all times since said 6th day of June, 1901, has operated, and now does operate, his said water-works plant and water system in virtue thereof and not otherwise.

## 7.

The plaintiff further alleges that the period of six and one half ( $6\frac{1}{2}$ ) years has elapsed since the rates and charges for water under said Ordinance 86 were fixed, in manner and form as set out in section two (2) of the said Ordinance, and that under the

61 laws of the State of Idaho, the plaintiff for a long time has been and now is entitled to have a new schedule of water rates and charges fixed, both for itself and for the inhabitants of said city, governing the use of, and payment for, water furnished by the defendant under his said franchise, and that the liminary period for which rates and charges were fixed by said Ordinance No. 86 expired on the 6th day of June, 1906; that the schedules of rates and charges for water fixed by said Ordinance No. 86 on June 6th, 1901, have

ceased to be reasonable and proper and are no longer a just measure of the amounts that ought to be paid by the plaintiff and the inhabitants of said city to the defendant for water furnished under his franchise, in view of the growth and expansion of said city, the great increase in the number of the population, and the inferior and unsatisfactory water service furnished by the defendant; and that the rates and charges fixed by said Ordinance No. 86 in the year 1901 are now excessive, extortionate, and oppressive in each and every instance.

## 8.

That under the laws of the State of Idaho, and in particular an Act of the Legislature approved March 16th, 1907, and entitled "An Act to Amend Section 2711 of the Revised Statutes of the State of Idaho, as amended by an Act approved March 9th, 1905," it is provided that the rates to be charged for water by all persons, companies or corporations supplying water to towns and cities must be determined by commissioners to be selected as therein provided, to-wit: two by town or city authorities, each to be a taxpayer of the given town or city, and two by the *the* person, company or corporation supplying water, the last two to be selected within thirty (30) days after written notice of the action of the town or city, which said notice shall have been given and made within ten (10) days after the selection by the town or city of the first two commissioners; that it is further provided by said laws of Idaho that in case said four commissioners, selected as aforesaid, cannot agree on the rates to be fixed, they must select a fifth commissioner, who shall also be a taxpayer of such town or city, and in case they cannot agree on such fifth commissioner, then the Probate Judge of the county in which such town or city is situated must, within ten (10) days after notice to him by the four commissioners already so selected that they cannot agree on a fifth commissioner, proceed to select a fifth commissioner, qualified as in said laws provided; that the decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all uses and purposes for the period of three (3) years then next ensuing from the date of such decision, and until new rates are established as by said laws provided; that the decision of such commissioners must be made within ninety (90) days from the date on which such board of water commissioners is complete; and that any person, company, or corporation supplying water, and failing or refusing within the time specified by law to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars (\$100.00) per day for every day thereafter, and until such commissioners are appointed.

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## 9.

That on the 20th day of July, 1908, the plaintiff, by due and legal resolution of its City Council, duly introduced, passed and approved by its Mayor, made and appointed two (2) commissioners under the said laws of the State of Idaho for the purpose of fixing rates and

court may hereafter order and adjudge in the premises. And the plaintiff further alleges that in order that it may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by defendant under his said franchise to the plaintiff and its inhabitants for the period of three (3) years now next ensuing, or any part of such relief, it is necessary that this court interpose and intervene by the exercise of its equity powers, and proceed to make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to this Court shall seem meet and proper.

Wherefore the plaintiff prays:

1. That a subpoena may issue out of this court, in accordance with the usual practice in that behalf, directed to the defendant, the said James A. Murray, doing business under the name of the Pocatello Water Company, and requiring and directing him to appear and answer the plaintiff's bill of complaint upon a day certain, and to abide the judgment of this court in the premises.

2. That the Court make, fix, and promulgate reasonable rates and charges for water to be furnished by the defendant under his hereinbefore mentioned franchise and grant to the plaintiff and its inhabitants for the period of three (3) years next ensuing from the date of the Court's order and judgment in the premises, and adjudge and decree that the same as fixed, made and promulgated are  
68 just and reasonable; and that the defendant be restrained and enjoined from making, fixing or promulgating any other rate or rates, charge or charges for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges for water during said time.

3. That the Court, by due order made in that behalf, may appoint a temporary receiver of the water works plant and water system of the defendant, James A. Murray, and may order and require said receiver, when he shall have duly qualified for his trust and office, to collect and safely keep all the monthly or other cash revenues of said water works plant and water system, and to deposit the same at such place and in such institution as the court shall or may order, and to finally apply and expend and dispose of the same in such manner and for such purpose or purposes as this Court may or shall further order, and to do any and all other things in the premises which this court may or shall order and require as a court of Equity.

4. For final judgment against the defendant herein, upon the trial of the issues herein, in the sum of one hundred dollars (\$100.00) per day from the 28th day of August, 1908, to the date of the filing of this bill of complaint, or Fourteen Thousand Three Hundred Dollars (\$14,300.00) in all, and for the further sum of one hundred dollars (\$100.00) per day from the date of the filing of this bill of complaint to the date of final judgment herein, and for costs.

5. For such other, or further, or different relief as to the  
69 court may seem meet, and in accordance with equity and good conscience.

And your orator will ever pray, etc.

H. V. A. FERGUSON,  
*Of Counsel.*

W. H. WITTY,  
*City Attorney of Pocatello.*

STATE OF IDAHO.

*County of Bannock, ss:*

Charles E. M. Loux being first duly sworn, on oath says: I am the duly elected, qualified and acting Mayor of the City of Pocatello, a municipal corporation, the plaintiff litigant named above; I have read or heard read the foregoing bill of complaint, and know the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

C. E. M. LOUX.

Subscribed and sworn to before me, this 16th day of January, 1909.

[NOTARIAL SEAL.]

R. R. WILSON,  
*Notary Public.*

My commission expires, July 6, 1912.

Endorsed: Filed January 19, 1909. A. L. Richardson, Clerk.

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"EXHIBIT C."

*Demurrer to Bill of Complaint.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho.

In Equity.

CITY OF POCA TELLO, a Municipal Corporation, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business under the Name of the Pocatello Water Company at Pocatello, Idaho, Defendant.

The Demurrer of James A. Murray, Defendant, to the Bill of Complaint of the City of Pocatello, the Above-named Complainant.

This defendant by protestation, not confessing or acknowledging all of any of the matters and things in the said complainant's bill of complaint to be true in manner and form as therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth:

I.

That this court is without jurisdiction of the subject matter of said bill of complaint, the same not presenting a cause for equitable cognizance.

## II.

That said complainant in and by its said bill has not made or stated such a cause as entitles it, in a court of equity, to any relief against this defendant as to the matters set forth in said bill, or any of said matters.

## III.

71 That said bill is multifarious in that inconsistent causes of action *as* therein stated. The complainant sets forth in said bill that James A. Murray has a franchise for the purpose of furnishing water for domestic purposes to the City of Pocatello, and that said Murray resides in the State of Montana; that the law of the State of Idaho provides that upon due and proper notice, every person furnishing water to cities and villages within the State of Idaho, shall appoint water commissioners for the purpose of determining rates, and that said Murray refused to appoint said commissioners, and thereby became liable for one hundred (\$100.00) dollars per day penalty provided in said Act. Plaintiff then prays for a money judgment for fourteen thousand three hundred (\$14,300.00) dollars; also that the court fix and promulgate reasonable rates and charges for the water furnished to complainant by the defendant; also that the court appoint a Receiver for defendant's water plant, and that plaintiff have general relief.

## IV.

Said bill is also multifarious in that there is a misjoin-er of causes of action, to-wit:

(a) A cause of action in favor of the plaintiff and against the defendant to recover a money judgment for a penalty under the Idaho statute.

(b) A cause of action in equity to fix reasonable rates and charges.

(c) A cause of action in equity for the appointment of a Receiver.

Wherefore and for divers other good causes of demurrer appearing in the said bill this defendant doth demur thereto and humbly prays the judgment of this Honorable Court whether he shall be  
72 compelled to make any answer to said bill, and prays to be hence dismissed with his reasonable costs and charges in this cause most wrongfully sustained.

D. WORTH CLARK,  
J. R. A. BUDGE,  
*Said Defendant's Solicitors.*

Residence and P. O. Address, Pocatello, Idaho.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

D. WORTH CLARK,  
*Of Counsel for Defendant, James A. Murray.*

STATE OF IDAHO,

*County of Bannock, ss:*

D. Worth Clark being first duly sworn deposes and says that he is attorney for the defendant above named, and that said defendant does not reside within the State of Idaho, and is not now within said State, and is not now accessible so that this verification can be made by him at any time before February 28th, 1909, and for that reason this affiant makes this verification in behalf of said defendant. That the foregoing demurrer is not interposed for delay.

D. WORTH CLARK.

Subscribed and sworn to before me this 24th day of February, 1909.

[NOTARIAL SEAL.]

D. W. CHURCH,  
*Notary Public.*

We, the undersigned, attorneys of record for the plaintiff, the City of Pocatello, hereby consent that the above and foregoing demurrer verified by the oath of D. Worth Clark, may be filed and  
73 considered, and may have the same force and effect as a demurrer as though verified by the oath of James A. Murray, the defendant, and we hereby waive any and all objections to the sufficiency of the verification of said demurrer, and we further agree that if at any time any question is raised by the court or other person as to the sufficiency of such verification, that defendant may have ample time to supply a proper verification, and that we will not at any time ask for a decree pro confesso on account of any defective verification to the above demurrer.

H. V. A. FERGUSON,  
W. H. WITTY,  
*Attorneys for Plaintiff City of Pocatello.*

Service of a copy acknowledged this 25th day of February, A. D. 1909.

H. V. A. FERGUSON,  
*Attorney for Plaintiff.*

Endorsed: Filed Feb. 26th, 1909. A. L. Richardson, Clerk.

## "EXHIBIT D."

At a Stated Term of the Circuit Court of the United States for the District of Idaho, Held at Boise, Idaho, on Monday the 3rd Day of May, 1909.

Present: Hon. John J. De Haven, Judge.

No. 128, Southern Division.

THE CITY OF POCATELLO, a Municipal Corporation,

vs.

JAMES A. MURRAY, Doing Business under the Name of the Pocatello Water Company at Pocatello, Idaho.

On this day was announced the decision of the Court upon  
74 the demurrer to the bill of complaint herein, heretofore argued and submitted, which decision is in writing and on file in said cause and is to the effect that said demurrer be sustained and the bill dismissed and that the defendant recover costs herein.

Whereupon it is ordered that the demurrer to the bill of complaint herein be sustained, that said bill be and is hereby dismissed and that the defendant James Murray, doing business under the name of the Pocatello Water Company at Pocatello, Idaho, do have and recover of and from the City of Pocatello, a municipal corporation, the plaintiff, his costs and disbursements expended in said cause taxed at the sum of \$16.40.

UNITED STATES OF AMERICA,

*District of Idaho, ss:*

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing is a true copy of the Judgment in said cause entered in the Judgment Book of said court at page 177, Southern Division.

Witness my hand and the seal of said Court this 3rd day of May, 1909.

[SEAL.]

A. L. RICHARDSON, *Clerk.*

## "EXHIBIT E."

Copy of opinion of Judge De Haven in the case of City of Pocatello, plaintiff, v. James A. Murray, as Pocatello Water Company, defendant, reported 173 Federal Reporter, 282.

United States Circuit Court, District of Idaho.

CITY OF POCATELLO, Plaintiff,

v.

JAMES A. MURRAY, as the Pocatello Water Company, Defendant.

*Opinion and Decision of the Court.*

1. Constitutional Law (Sec. 128)—Obligation of Contracts—Contract with City.

"Where a city, having power to do so, entered into a contract with a water company, granting a franchise and fixing charges which might be made to consumers, and also providing the mode by which such charges might be changed from time to time after a fixed term, such provision was a material part of the contract which could not be impaired or affected by a subsequent state statute providing a different mode of establishing rates generally."

(Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. Secs. 372-379; Dec. Dig. Sec. 128.)

2. Waters and Water Courses (Sec. 203)—Jurisdiction—Fixing Water Rates.

"A court of equity is without power, at suit of a city, to fix the rates to be charged by a water company in the future, which is not a judicial function."

(Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. Sec. 292; Dec. Dig. Sec. 203.)

In Equity. Suit by the City of Pocatello against James A. Murray, doing business under the name of the Pocatello Water Company. On demurrer to bill. Demurrer sustained.

W. H. Witty and H. V. A. Ferguson, for plaintiff.

D. Worth Clark, for defendant.

DE HAVEN, *District Judge*:

76 The questions arising upon the demurrer to the bill have been ably argued by counsel for the respective parties, and have been fully considered by me. In order to clearly understand the questions involved, it is only necessary to say that the bill of complaint alleges, in substance, that the defendant is the owner, and in possession, of a system of water-works in the city of Pocatello, under franchise granted to him by the city on June 1, 1901, by a certain ordinance numbered 86, alleged to be in full force and effect,



and set out in the bill. This ordinance recites that the supply of water furnished the city—

“\* \* \* is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink Creek and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe, at a large additional expenditure of money; and

“Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and

“Whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the city of Pocatello to extend and give the assurance asked for”—

and then proceeds to name a schedule of water rates which the defendant was authorized to charge for a period of five years. The ordinance then further provides:

“SEC. 3. The foregoing rates and charges are hereby adopted by the city of Pocatello, by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said city, for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time if the earnings of said water system shall exceed 5 per cent. above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the ‘Schedule of Water Rates’ of section 2 of this ordinance may be readjusted so as to yield not less than 5 per cent. above reasonable expenses on the valuation, but no readjustment shall hereafter be made that will yield less than 5 per cent. above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section 4.

“SEC. 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section 3, and if the city of Pocatello and the said James

77 A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained in the following manner, to wit: A committee of four experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by the said James A. Murray, or his successors or assigns, and the following question shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth; and, if they cannot agree upon a fifth, they shall request the president of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates, and such decision shall be final.”

The five-year period for which rates and charges were fixed by section 3 of the ordinance expired on June 6, 1906, and the bill alleges:

"That said schedule of rates and charges has ceased to be reasonable and proper, and is no longer a just measure of the amounts that ought to be paid by the plaintiff and the inhabitants thereof for water furnished to them under said franchise, in view of the growth and expansion of said city and the inferior and unsatisfactory water service furnished by said defendant, and that said rates are now excessive, extortionate, and oppressive in each and every instance."

It is also alleged that, under an act of the Legislature of Idaho approved March 16, 1907, (Laws 1907, p. 555), entitled "An act to amend section 2711 of the Revised Statutes of the state of Idaho, as amended by an act approved March 9, 1905" (Laws 1905, p. 192):

"It is provided that the rates to be charged for water by all persons, companies, or corporations supplying water to towns and cities must be determined by commissioners to be selected as therein provided, to wit: Two by the town or city authorities, each to be a taxpayer of the given town or city, and two by the person, company or corporation supplying water, the last two to be selected within thirty days after written notice of the action of the town or city, which said notice shall have been given and made within ten days after the selection by the town or city of the first two commissioners"—

and in case the commissioners so selected cannot agree upon rates, then a fifth shall be chosen in the manner provided by the act and set out in the bill of complaint, and that the rates fixed by such commissioners are to continue in force for three years. The bill

78 further alleges that, prior to the commencement of this action, the plaintiff made and appointed two commissioners under the act above referred to, that written notice of its action was given to the defendant, and that defendant has failed and refused to name commissioners to act with those appointed by the plaintiff.

The prayer of the bill is, that the court fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants—

"for the period of three years next ensuing from the date of the court's order and judgment in the premises, and adjudge and decree that the same, as fixed, made, and promulgated, are just and reasonable, and that defendant be restrained and enjoined from making, fixing, or promulgating any other rate or rates, charge or charges, for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges, for water during said time."

And it also prays for a judgment against the defendant for the sum of \$14,300 00 for its past default, "and for the further sum of \$100 per day from the date of the filing of this bill of complaint to the date of final judgment herein" as a penalty for defendant's refusal to appoint commissioners to jointly act with those of the plaintiff in fixing charges and rates for water under the above referred to statute of Idaho.

The defendant has demurred to the bill upon the ground that it does not state a cause of action entitling the complainant to any equitable relief, and also upon the ground that the bill is multifarious.

1. I do not deem it necessary to consider whether the bill of complaint is subject to the objection of multifariousness, as in my opinion the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the complainant to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The city of Pocatello, under its general power to

79 provide the city with water, was authorized to contract with any person or corporation to furnish water for it and its inhabitants; and Ordinance No. 86, under which the defendant is furnishing water to the complainant and its citizens, constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and are for that reason not affected by the subsequent statute of Idaho of March 16, 1907, amending section 2711 of the Revised Statutes of 1887 of the state of Idaho referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because the defendant desired "to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service" before undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation upon the part of the city of Pocatello to pursue the mode pointed out in these sections in readjusting or changing the water rates named in the ordinance, an obligation which, under article 1, Sec. 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections prescribe for adjusting and fixing the charges to be allowed the defendant for water furnished by him, under the ordinance, cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant.

2. But I am further of the opinion that even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the city of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, 80 this court would still be without jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract, "is a legislative or administrative, rather than a judicial, function. *Reagon v. Farmers' Loan & Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1062, 38 L. Ed. 1031. *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12. This is the general rule.

and the fact alleged in the bill that defendant has refused to join with the complainant in naming commissioners to fix the rates which he shall be allowed to charge for furnishing water under his franchise, as provided in the statute relied on by complainant, is not sufficient to create an exception to the rule, and does not authorize the court to extend its jurisdiction, and take upon itself the exercise of the "legislative or administrative" power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years.

The demurrer to the bill of complaint is sustained, and the bill dismissed; the defendant to recover costs.

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"EXHIBIT F."

In the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County.

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs.

JAMES A. MURRAY, Doing Business under the Name and Style of Pocatello Water Company, and George Winter, Defendants.

*Complaint.*

Comes now the plaintiff above named and complains of the defendants herein, and for cause of action alleges:

I.

That the plaintiff is now and during all the times hereinafter mentioned was a municipal corporation, and a city of the second class, duly organized and existing under and by virtue of and pursuant to the laws of the State of Idaho, the limits and boundaries of said city embracing certain land within the County of Bannock, State of Idaho.

II.

That the defendant above named, James A. Murray, is a citizen of the State of Montana, and customarily resides at Butte City in the County of Silver Bow, in the State of Montana; and the defendant, George Winter, is the Manager of the water works system hereinafter described, and is in the complete and absolute control of the same at Pocatello, in Bannock County, Idaho.

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III.

That at the dates and times mentioned in this complaint, defendant James A. Murray was and now is doing business in said City of Pocatello in conducting a water works plant and water system for the purpose of furnishing the citizens of Pocatello a pure and adequate supply of water for domestic uses and lawn purposes, said business being conducted under the name and style of the Pocatello Water Company.

## IV.

That on the 6th day of June, 1901, the plaintiff granted unto said defendant James A. Murray, his successors and assigns, the right, privilege, power and authority to construct, operate, hold, own and maintain within the corporate limits of the City of Pocatello, a full and complete system of water works for the supplying of the said City of Pocatello and the inhabitants thereof, with a sufficient and adequate supply of pure and healthful water; said ordinance providing that the quantity supplied should be sufficient to supply both the private and public uses and purposes of the citizens and inhabitants of the City of Pocatello, and that the pressure maintained for fire purposes should be at least one hundred and fifty (150) feet perpendicular fall. A copy of which said ordinance is hereto attached marked "Exhibit A" and made a part hereof.

## V.

That the defendant James A. Murray immediately upon the passage and approval of said ordinance No. 86, accepted the same, and the franchise granted thereunder, and by virtue of the privileges thereof has at all times since said time been operating at Pocatello, Bannock County, Idaho, said water works and system.

## VI.

That said water works system so constructed and operated by said James A. Murray, conveys water from two small mountain streams known as Gibson Jack Creek and Mink Creek, which is the only source of supply for the furnishing of water to the citizens of Pocatello for lawn irrigation and domestic purposes; That said James A. Murray has not conducted to the reservoirs and to the City of Pocatello all of the waters of these creeks which is available for that purpose, but has laid mains and pipes and caused to be conducted to the citizens of Pocatello for domestic use, only a small proportion thereof; that the supply of water so furnished by said James A. Murray to the citizens of Pocatello is wholly inadequate for the needs of said City of Pocatello and its citizens, and for many years last past during the summer seasons, said city has been almost wholly without fire protection, and thereby the lives and safety of the people have been endangered, and also said citizens have had only a very limited amount of water for domestic uses.

## VII.

That during all of said years, and at the present time the citizens of Pocatello, and the City of Pocatello have paid when due all water rates and charges made by said James A. Murray as provided in said ordinance marked "Exhibit A".

## VIII.

That upon numerous occasions and each and every year for the last six or eight years there has been a shortage in the supply of

water furnished by said James A. Murray under and pursuant to the provisions of said Ordinance, and the citizens of Pocatello and the City Council and Mayor thereof, have made repeated and numerous requests and demands upon said James A. Murray and his said Manager George Winter, that a pure and healthful and adequate supply of water be furnished as provided in said ordinance hereto attached and marked "Exhibit A", but to furnish such supply said James A. Murray and said George Winter have at all times refused and still refuse.

### IX.

That said defendant has allowed the source of supply and the reservoirs and mains through which said water is conducted to become filthy and unwholesome, and thereby has caused the water delivered to the citizens of Pocatello to become impure and unfit for domestic purposes.

### X.

That said defendant, George Winter, according to the information and belief of this plaintiff, is a habitual user of drugs and stimulants such as cocaine or morphine or some similar drugs, and a great portion of the time is wholly irresponsible for his acts and insane by reason of said drug habit, and when in this condition mentally conceives the idea that he is the enemy of the citizens of the City of Pocatello, and resorts to outrageous ways of venting his spite and spleen against the citizens to such an extent that upon various occasions the water has been shut off from the City without warning, and without any necessity existing therefor, and the City has been deprived of water entirely, and of adequate fire protection, and thereby the lives and property of the citizens of the City endangered: That said George Winter also refuses to attempt to make any provision whatever to store water so that the City may be protected in case of fire: That the weather is now dry and hot and all of the property situated within the limits of the City of Pocatello is in imminent danger of being destroyed by fire, and the citizens have no adequate supply of water for domestic uses, and the City has no water for street sprinkling except that obtained from other sources.

### XI.

Plaintiff alleges according to its information and belief that defendant George Winter during the last municipal campaign was violently opposed to the election of any of the present City officers and at that time made threats openly and publicly that if any of said officers were elected he would cause the citizens trouble: That pursuant to said threats and for the purpose of venting his spite and ill feelings and for no other purpose said George Winter, according to the plaintiff's information and belief has deliberately caused the storage reservoirs containing the only available supply of water for the needs of the city and to protect it against damage by fire to be emptied, thereby leaving the city without fire protection.

That in addition thereto said George Winter has upon occasions, deliberately and maliciously, and at times when the most inconvenience would be suffered by the citizens of Pocatello and without notice, shut off the water service and now threatens that if the City goes into Court to protect and maintain its rights that he will cause all of the water supply for Pocatello to be turned into the Portneuf River and deprive the citizens of Pocatello from water entirely.

That said George Winter as hereinbefore alleged is according to the information and belief of this plaintiff, addicted to the use of drugs and at times is mentally irresponsible and insane, and while so under the influence of drugs and while so insane this plaintiff believes and therefore alleges, that said Winter is very likely to cause such threats to be carried into execution, and there is very grave danger at the present time that by and through the insane action of said George Winter the City will be deprived entirely of its water supply and thereby the City and citizens suffer great and irreparable injury.

## XII.

That said George Winter is now engaged in running and conducting the Pocatello Water system for the sole and only purpose of causing the City of Pocatello and its inhabitants all the annoyance and inconvenience possible and without due or any regard to the rights of its citizens and openly threatens that the worst is yet to come, and that he has only just begun in his campaign of vengeance, malice, ill will and hatred.

## XIII.

That the City at present has no other way of obtaining water for the use of itself and its inhabitants, and it is the information and belief of this affiant that if some competent person were placed in charge of said water system temporarily, that the lives and property of the citizens of Pocatello could be saved that are now endangered by virtue of the insane and unreasoning attitude assumed by said George Winter, the Superintendent of said water works system. That said James A. Murray is out of the State and cannot be reached, and for that reason it is useless to make any appeal to him.

## XIV.

That plaintiff believes that unless restrained by an order of this court said defendant George Winter will put his threats heretofore made, into execution and will deprive the city of Pocatello and its inhabitants of water by shutting the source off and wasting it and turning it into the Portneuf River and committing other unlawful and malicious acts thereby depriving said city and its inhabitants of adequate fire protection and of water for domestic and other uses.

Plaintiff therefore states that it has no plain, speedy or adequate remedy at law, or any other adequate or sufficient remedy in equity, and therefore prays this Court to appoint a temporary Receiver or

representative of this Court to take charge of said water works system, and to operate the same under the orders and directions of this Court until such time as the condition now existing may be relieved for the purpose of protecting the lives and property of the inhabitants of the City.

That defendants be enjoined from shutting off the supply of water to plaintiff and its inhabitants as threatened; that they be enjoined from conducting or running any water into the Portneuf River, or doing any act that will in any way injure the said water supply or system or deprive said city and its inhabitants of water and from in any way interfering with the free and uninterrupted flow of water to and through the pipes, reservoirs and mains now owned and operated by them to the City of Pocatello, to the extent of the capacity of said plant except the same be done under and pursuant to the order and direction of this Court and for the purpose of promoting public safety.

Plaintiff further prays that the contract and franchise ordinance under which said defendant is operating and heretofore referred to, be cancelled, annulled, and held for naught, and that plaintiff be relieved from all obligations thereunder, and that plaintiff have such other and further relief as to this Court shall seem proper and agreeable to equity.

Plaintiff prays for its costs of suit herein incurred.

P. C. O'MALLEY,  
CLARK & BUDGE,

*Attorneys for Plaintiff, Residence, Pocatello, Idaho.*

STATE OF IDAHO,

*County of Bannock, ss:*

J. M. Bistline being first duly sworn deposes and says: That he is Mayor of the City of Pocatello, and makes this verification for and in its behalf; that he has read the above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be upon information or belief, and as to those matters he believes it to be true.

J. M. BISTLINE, *Mayor.*

Subscribed and sworn to before me this 18th day of August, 1911.  
[SEAL.]

P. C. O'MALLEY,

*Notary Public.*

Endorsed: Filed August 21, 1911. E. G. Gallet, Clerk. Transcript on Removal, including above complaint. Endorsed: Filed Nov. 7, 1911. A. L. Richardson, Clerk, by Theo. Turner, Deputy.

(Title of Court and Cause.)

*Demurrer.*

Comes now the plaintiff and demurs to the answer filed herein by the said defendant to the Alternative Writ of Mandate heretofore



issued herein, and for cause of such demurrer says, that said answer does not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue herein.

Plaintiff further demurs to the first offense contained in defendant's said answer, and for cause of demurrer thereto says, that said first defense does not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue herein.

Plaintiff further demurs to the second defense contained in defendant's said answer, and for cause of demurrer thereto says, that said second defense does not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue herein.

Plaintiff further demurs to the third defense contained in defendant's said answer, and for cause of demurrer to said third defense plaintiff says, that said third defense does not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue herein.

Plaintiff further demurs to the fourth defense contained in defendant's said answer, and for cause of demurrer to said fourth defense plaintiff says, that said fourth defense does not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue herein.

CLARK & BUDGE,

P. C. O'MALLEY,

*Residence, Pocatello, Idaho;*

RICHARDS & HAGA,

*Residence, Boise, Idaho,*

*Attorneys for Plaintiff.*

Endorsed: Filed Dec. 4, 1911. I. W. Hart, Clerk.

91-94

CLERK'S OFFICE,

*Supreme Court, ss:*

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing and annexed is a true and complete copy of the pleadings in the above entitled action, to wit: Affidavit for Writ of Mandate, with Exhibits A and B attached; Amendment to Affidavit; Demurrer to Affidavit, Motion to Quash Affidavit; Answer, with Exhibits A, B, C, D, E and F attached; Demurrer to Answer; Alternative Writ of Mandate.

In witness whereof, I have hereunto set my hand and affixed the Seal of the Court this 30th day of January, 1912.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

95 In the Supreme Court of the State of Idaho.

CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs.  
JAMES A. MURRAY, Defendant.

*Stipulation.*

Whereas, by reason of other engagements, it will be impossible for counsel for defendant to appear in said cause, in the above entitled court, on the 4th day of December, 1911; and for the foregoing reason it is hereby stipulated by and between counsel for the respective parties that, if agreeable to the Court, that the hearing of said cause may be set down for any time during the second week of the December Term, 1911

Dated this 27th day of November, 1911.

P. C. O'MALLEY AND  
CLARK & BUDGE,

*Attorneys for Plaintiff, Residing at Pocatello, Idaho.*  
N. M. RUICK,

*Attorney for Defendant, Residing at Boise, Idaho.*  
GEORGE E. GRAY,

*Attorney for Defendant, Residing at Pocatello, Idaho.*

Indorsed: Filed Nov. 29, 1911. I. W. Hart, clerk.

96 *Record Entries.*

BOISE, IDAHO, September 25, 1911.

SUPREME COURT.

*State of Idaho, ss:*

Court met pursuant to adjournment.

Present: Hon. George H. Stewart, Chief Justice; Hon. James F. Ailshie, Justice; Hon. Isaac N. Sullivan, Justice, and the officers of the court, when the following proceedings (among others) were had, to wit:

No. 1902.

THE CITY OF POCATELLO, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business as the Pocatello Water Co., Defendant.

*Application for Writ of Mandate.*

On this day comes D. Worth Clark, and files and presents to the court the petition of plaintiff herein for a writ of mandate against defendant, and good cause appearing therefor, it is ordered that an alternative writ of mandate issue under the seal of this court, directed

to defendant, in accordance with the prayer of plaintiff's petition, returnable at Boise City on the 4th day of December, at 10 o'clock A. M.

97

BOISE, IDAHO, *December 11, 1911.*

SUPREME COURT.

*State of Idaho, ss:*

Court met pursuant to adjournment.

Present: Hon. George H. Stewart, Chief Justice; Hon. James F. Ailshie, Justice; Hon. Isaac N. Sullivan, Justice, and the officers of the court, when the following proceedings (among others) were had, to wit:

No. 1902.

THE CITY OF POCATELLO, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business as the Pocatello Water Co., Defendant.

An alternative writ of mandate having been heretofore issued in this cause returnable on December 4th, and the hearing having been thereafter postponed to December 11th, now on this day the cause was called, D. Worth Clark, O. O. Haga and P. C. O'Malley appearing for plaintiff, and N. M. Ruick and George E. Gray appearing for defendant. After argument the cause was submitted and by the court ordered taken under advisement.

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BOISE, IDAHO, *January 18, 1912.*

SUPREME COURT.

*State of Idaho, ss:*

Court met pursuant to adjournment.

Present: Hon. George H. Stewart, Chief Justice; Hon. James F. Ailshie, Justice; Hon. Isaac N. Sullivan, Justice, and the officers of the court, when the following proceedings (among others) were had, to wit:

No. 1902.

THE CITY OF POCATELLO, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

*Application for Writ of Mandate.*

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the

decision of the court is delivered by Justice Ailshie, to the effect that a peremptory writ of mandate issue as prayed for.

It is therefore considered, adjudged and decreed by the court that defendant's demurrer to the complaint herein be overruled, that plaintiff's demurrer to the answer be sustained, and that a peremptory writ of mandate issue under the seal of this court directed to defendant herein, in accordance with the prayer of the complaint. Costs are awarded in favor of plaintiff.

98 In the Supreme Court of the State of Idaho, December Term, 1911.

Filed Jan. 18, 1912. I. W. Hart, Clerk.

CITY OF POCA TELLO, Plaintiff,

VS.

JAMES A. MURRAY, Defendant.

Res Adjudicata—Constitutional Law—Legislative Authority to Prescribe Manner of Fixing Water Rates—Sale of Water a Public Use—Municipal Authority to Contract for Water Supply—Municipal Authority to Prescribe Method of Fixing Rates—Contract Subject to Constitutional Provisions—Impairment of Obligation of Contract—Taking Property Without Due Process of Law—Plea of another Action Pending.

*(Syllabus by the Court.)*

1. Where a bill was filed in the Circuit Court of the United States by a municipal corporation against M., who was maintaining and operating a water works system within the municipality, praying that the court "fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants \* \* \* and that the defendant be restrained and enjoined from making, fixing or promulgating any other rate or rates" greater than or different from those fixed by the court, and the court after hearing the case argued on demurrer to the petition entered an order and judgment sustaining the demurrer and dismissing the bill on the ground that the court was "without jurisdiction to fix and promulgate the water rates and charges which defendant shall have the right to collect," and thereafter the municipality filed its complaint in the state court, setting forth that the water rates charged by the defendant are unreasonable and

99 unjust and that it has appointed commissioners in conformity with the provisions of Sec. 2839, Rev. Codes, and that the defendant has neglected and refused to appoint like commissioners in conformity with the provisions of the statute and prays that the court issue a writ, commanding and compelling the defendant to appoint commissioners in conformity with the statute. (Sec. 2839, Rev. Codes), held: That a plea that the judgment of

the United States Circuit Court in dismissing the bill filed in that court is a bar to the prosecution and maintenance of the subsequent action in the state court, is not well taken and does not state facts sufficient to constitute an estoppel.

2. Where a case was dismissed and disposed of on the ground that the court had no jurisdiction to hear and determine the matter involved, such court was without jurisdiction to determine or pass upon any question raised by the pleadings except the question alone of the court's jurisdiction; and any further finding or holding by the court with reference to the matters pleaded is not binding in a subsequent action between the same parties and cannot become *res adjudicata*.

3. Under the provisions of Secs. 1 and 2 of art. 15 of the state constitution, the use of all waters within this state which are sold, rented or distributed for a beneficial use is declared to be a public use and subject to the regulation and control of the state in the manner prescribed by law, and the right to collect rates or compensation for water supplied to any county, city, town or water district or the inhabitants thereof, is a franchise and cannot be exercised except by authority of and in the manner prescribed by law.

4. Sec. 6, art. 15, of the constitution ordains that "The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

5. After the adoption of Secs. 1, 2, and 6 of Art. 15 of the state constitution, it was in excess of and beyond the power of any city, town or village within this state, by ordinance, contract or otherwise, to bind itself or the inhabitants thereof to pay fixed rates or charges for water sold, rented or distributed for any longer or greater period of time than that intervening between the time of the passage of such ordinance and making of such contract and the subsequent fixing of rates under the enactment by the legislature of a statute prescribing the manner and method in which reasonable maximum rates might be established. Such an ordinance or contract would, on the other hand, be binding and enforceable until such time as the legislature, complying with the provisions of Sec. 6 art. 15, enacted a statute prescribing the manner of fixing such rates and rates are established in conformity therewith.

6. Ordinance No. 86 of the city of Pocatello, adopted on June 1, 1901, which prescribed a schedule of rates which the Pocatello Water Co. might charge for supplying water to the inhabitants of the city of Pocatello for a fixed period of time and which also provided the method and manner of thereafter appointing a commission to establish rates at the expiration of such period, must be read and construed in the light of the provisions of the constitution (Secs. 1, 2, and 6 of art. 15), and was subject to the operation of the constitution and the power of the legislature to prescribe the manner in which reasonable maximum rates might thereafter be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose.

101 7. The appointment of commissioners under the provisions of sec. 2839, Rev. Codes, which was enacted subsequent to the adoption of ordinance No. 86 of the city of Pocatello, does not impair the obligation of a contract previously executed and is therefore not in violation of Sec. 10, art. 1, of the constitution of the United States, nor does it have the effect of taking defendant's property without due process of law in violation of Sec. 1 of the Fourteenth Amendment to the federal constitution.

8. Sec. 6, art. 15, of the state constitution, guarantees to everyone engaged in supplying water under a sale or rental that the rates to be established shall always be "reasonable maximum rates," and that as a consequence thereof the property of one so engaged shall not be taken without due process of law.

9. No one has a vested right to charge an unreasonable or unconscionable rate to consumers while exercising a franchise to serve a public use; and to deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate or unconscionable rate, deprives him of no right, natural or acquired, and cannot be the impairment of a contract within the purview and meaning of the federal constitution, nor does it amount to depriving him of property without due process of law.

10. The fact that Sec. 2839 of the Rev. Codes, which provides for the appointment of a commission for the purpose of fixing rates to be charged water consumers, requires that such commissioners shall be "taxpayers of the city", does not render the statute obnoxious to either the state or federal constitution on the ground that it does not provide an impartial and unprejudiced tribunal.

11. The plea of another action pending examined, considered, and held insufficient as a plea in abatement.

102 Original action by the City of Pocatello, praying a writ of mandate. Demurrer and answer by the defendant, and demurrer by the plaintiff to defendant's answer. Demurrer to the complaint overruled; demurrer to the answer sustained. Peremptory writ issued.

P. C. O'Mally, Clark & Budge, Richards & Haga, for plaintiff.  
George E. Gray and N. M. Ruick for defendant.

103 AILSHIE, J.:

This is an application praying for the issuance of a writ of mandate directed to the defendant commanding and requiring him to appoint commissioners in conformity with the provisions of Sec. 2839 of the Rev. Codes, for the purpose of conferring and acting with the commissioners appointed by the plaintiff and fixing and determining rates to be charged by defendant for water furnished to the plaintiff city and the inhabitants thereof.

It appears that the defendant, James A. Murray, is doing business under the name and style of the Pocatello Water Co. and that as such he is the owner of the water system which supplies the plaintiff city and the inhabitants thereof. The city alleges that acting

through its city council on the 6th day of July, 1911, it determined and declared by proper resolution that the charges and rates for water service as supplied by the water company were "not fair, equitable or reasonable, and that a commission should be appointed pursuant to the provisions of the section 2839, Revised Codes of Idaho, 1909, to fix and determine the rate to be charged for water and water service to said city and its inhabitants"; and that it thereupon appointed two commissioners for the purpose of conferring and acting in conjunction with commissioners to be appointed under the provisions of the statute by the water company; that thereafter the city caused notice to be served on the defendant of the appointment of such commissioners and demanded that he appoint two commissioners to act with the commissioners so appointed by the city, and to especially represent the interests of the defendant, and that defendant has failed, refused and neglected to appoint commissioners

104 or to take any action in conformity with the statute in this connection. The defendant demurs to the complaint and also answers. The demurrer is on the ground of insufficient facts to constitute a cause of action. The plaintiff has also demurred to the answer and separate defense of the defendant on various grounds, chief of which is that the answer does not state facts sufficient to constitute a defense to the cause of action. The pleadings present the issues of law and raise such questions as must necessarily be determinative and decisive of this case.

The answer raises three principal questions of law which must be determined. First, it sets up ordinance No. 86 of the city of Pocatello, and alleges that the defendant, relying upon the provisions of that ordinance as a contract, invested his money in extending his water works and system and that he is not subject to the provisions of the statute, Sec. 2839, for the reason that the statute was passed subsequent to the passage of ordinance No. 86 and has the effect of impairing the contract and depriving him of his property without due process of law. Second, he pleads *res adjudicata*, in that he claims the same questions here raised have been adjudicated in the case of *City of Pocatello v. Murray*, 173 Fed. 382, by the circuit court of the United States for the district of Idaho; and, third, he pleads another action pending.

Ordinance No. 86 was passed June 1, 1901, and opens with a preamble reciting the fact that the franchise had previously been granted to Murray and his associates for the term of fifty years and that they had complied with the provisions of the contract in constructing a water system and that the village of Pocatello had since grown into a city of the second class, and that subsequently a commission had been appointed which had established rates to be charged for the use of water and that, "Whereas the rates and charges  
105 so fixed and continued are now deemed and considered to be fair, equitable, reasonable, and just, and will continue to be fair, equitable, reasonable and just, in the near future" and that James A. Murray has succeeded to the exclusive ownership of all the property of the company, and "Whereas, the present supply of water furnished by said water system is deemed inadequate for the present

and future need of said city, and said James A. Murray agrees to bring in the waters of Mink creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money; and,

"Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and,

"Whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the city of Pocatello, to extend and give the assurance asked for;

"Now, therefore, be it obtained by the Mayor and Council of the city of Pocatello: \* \* \*

"SECTION 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company, to the city of Pocatello, and the inhabitants thereof, heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the first day of September, 1895, and now in full force and effect within the said city of Pocatello, is hereby declared  
106 to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said James A. Murray, for both public and private uses, except as hereinafter stated, to wit:

\* \* \* \* \*

"SEC. 3. The foregoing rates and charges are hereby adopted by the city of Pocatello, by and for itself, and as trustees for the use and benefit of all private consumers of water within the corporate limits of said city for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system shall exceed five per cent above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of section Two of this Ordinance, may be readjusted so as to yield not less than five per cent. above reasonable expenses on the valuation, but no readjustment shall hereafter be made that will yield less than five per cent. above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section four.

"SEC. 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of Sec. 3, and if the city of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system for the purpose of such readjustment, then the value of said water system shall be ascertained and determined in the following manner, to wit:

"A committee of four experienced and disinterested hydraulic en-



107      gineers who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth, and if they cannot agree upon a fifth, they shall request the president of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates and such decision shall be final." \* \* \*

Ordinance No. 86 from which the foregoing provisions are quoted was adopted prior to the passage by the legislature of Sec. 2839 of the Rev. Codes, as the same is now in force and effect and under which it is thought to appoint commissioners and fix rates.

Before considering the question of the effect of this legislation on Ordinance No. 86 of the plaintiff city, we will consider the question of the plea of *res adjudicata* which has been interposed, because if that is well taken, it is unnecessary to discuss or consider any other question.

The case of *City of Pocatello v. Murray*, 173 Fed. 282, was a suit in equity filed in the Circuit Court of the United States, and the prayer of the bill as stated by the judge who wrote the opinion was "that the court fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants: for the period of three years next ensuing from the date of the court's order and judgment in the premises, and adjudge and decree that the same, as fixed, made, and promulgated, are just and reasonable, and that defendant be restrained and enjoined from making, fixing, or promulgating any other rate or rates, charge or charges, for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges, for water during said time." "The defendant," says the court, "has demurred to the bill upon the ground that it does not state a cause of action entitling the complainant to any equitable relief, and also upon the ground that the bill is multifarious." The court then proceeds to wave aside the objection of multifariousness and holds without discussion or citation of authority that the act of March 16, 1907, (Sec. 2839, Rev. Codes), had no application to the provisions of ordinance No. 86 of the city of Pocatello and could not abrogate the provisions thereof and provide any different method for the appointment of commissioners and fixing of rates than that prescribed by the ordinance, and suggested that to attempt to do so would be in violation of Sec. 10, art. 1, of the federal constitution. The court then proceeds to what appears to have been considered the real question upon which he determined that case. The demurrer to the bill was sustained on the ground that the court was "without jurisdiction to fix and promulgate the water rates and charges which the defendant shall have the right to collect during the next three years, under his franchise. The fixing of such rates,

when not a matter of contract, 'is a legislative or administrative, rather than a judicial function,' " said the court.

Entering upon the discussion of this latter question, on which the case seems to have really been disposed of, the court said: "But I am further of the opinion that even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the city of 109 Pocatello, and so prescribe the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect," etc.

While the court there took occasion to consider the effect of the statute (Sec. 2839) on the ordinance in question and expressed the view that the statute was inoperative as against that ordinance, still it is clear to us that the court disposed of the case on the sole ground of jurisdiction. As we understand it, where a case is disposed of on the ground that the court has no jurisdiction to hear and determine the matter, it has no jurisdiction to pass upon any question except the jurisdictional question. (Fulton v. Hanlow, 20 Cal. 450; Burnett v. Smart, 59 S. W. 235, 158 Mo. 178; Waldon v. Badley, 14 Pet. 156, 10 L. Ed. 398; Hughes v. U. S., 4 Wall. 237, 18 L. Ed. 303; Brown v. McKie, 78 N. E. 64; 23 Cyc. 1218, 1309 and 1317). It would therefore follow that the only matter in that case that could become res adjudicata in the case at bar would be that a circuit court of the United States had no equitable jurisdiction to fix and promulgate water rates and charges which might be demanded and collected by a person exercising a franchise and supplying a city and its inhabitants thereof with water. That discussion and determination would have no application to a state court, for the reason that the distinctions between actions at law and suits in equity still prevail in the federal courts, and a federal court of equity has no power to grant relief at law nor has a law court any power to grant equitable relief; but such is not the case in the state courts, because both

110 legal and equitable relief are granted by the same court, and no importance is given to the question of the manner or form of pleading a cause of action so long as the facts pleaded entitle the pleader to relief of any kind. (Art. 5, sec. 1, Constitution; Staples v. Rossi, 7 Ida. 618, 65 Pac. 67; Coleman v. Jagers, 12 Ida. 125, 85 Pac. 894; Dewey v. Schreiber Imp. Co., 12 Ida. 280, 85 Pac. 921.)

The judgment and order of the Circuit Court of the United States in dismissing the bill in *City of Pocatello v. Murray* is no bar to the present action and does not estop the city from maintaining this action.

Having determined that the decision of the federal court in the *City of Pocatello v. Murray* is not conclusive of the questions raised in this case and does not estop the city from raising the question here presented, we now pass to the vital question in the case, namely: the effect of Sec. 2839, Rev. Codes, on the provisions of ordinance No. 86 of the city of Pocatello and whether or not rates may be

established under the statute or must be fixed under the terms of the ordinance for the full period of fifty years as therein prescribed. No such question as now confronts us has ever before been presented to this court, and so it is a question of first impression in this state.

At the very inception of our consideration of this phase of the case, our attention is directed to the provisions of the constitution which were in force and effect at the time of the passage of ordinance No. 86, and at the time defendant received his franchise and constructed and extended his water system. Sec. 2, art 15, of the constitution provides as follows:

"The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

111 It should be observed that section 1 of this article of the constitution declares that "the use of all waters" within this state which may be "sold, rented or distributed" is "declared to be a public use and subject to the regulation and control of the state in the manner prescribed by law". Sec. 6, of art. 15 is as follows:

"The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

It will therefore be seen from the foregoing provisions of the constitution that, in the first place, the use of all waters within this state that may "be sold, rented or distributed is a public use, and subject to the regulation and control of the state in the manner prescribed by law". When Murray procured his contract for supplying the city of Pocatello and its inhabitants with water and undertook to deliver water to the city and its inhabitants and charge and collect rates or tolls, he immediately entered upon the discharge of the duty of supplying a "public use" and he was immediately chargeable with notice of the terms and conditions of the constitution to the effect that the business in which he was engaging and the service which he was undertaking to render would be forever "subject to the regulation and control of the state in the manner prescribed by law"—not the manner already prescribed by law, but in the manner that might from time to time be prescribed by the lawmaking power of the state,—a continuing and ever-existing power. His undertaking and engagement was further impressed with the terms of Sec. 2, art 15, supra, to the effect that his right to collect rates or compensation for such a service "is a franchise and cannot be exercised except by authority of and in the manner prescribed by law".—not the

112 manner already prescribed by law, but in such manner as might from time to time be prescribed by the supreme law-making power of the state (the legislature).—a continuing and ever-present power which might at any time be called into exercise. In addition to all this, however, the people had already by direct legislation in the fundamental law of the state ordained by Sec. 6, art. 15, of the constitution, above quoted, that "the legislature shall provide by law and manner in which reasonable maximum rates may be

established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

When Murray entered into his contract with the plaintiff city and when ordinance No. 86 was passed prescribing the manner and method of establishing rates to be charged, he had notice that the legislature was vested with the supreme power of providing the manner in which reasonable maximum rates might be established and that any contract he might make or that any ordinance which a municipality of this state could enact might be altered, changed or entirely abrogated by such legislation as the lawmaking power of the state might subsequently ordain. It is a fundamental principle of law that every man is supposed to contract with the laws of the jurisdiction in mind and subject to their provisions. It is unreasonable to suppose that parties can so contract as to hamper or restrain future legislation or avoid the operation of a statute or contract themselves out from under the provisions of the constitution. If contracts could be made so as to anticipate and avoid the effect of an act of the legislature passed in the exercise of its constitutional power and authority, we would no longer have a government of law but rather a government under special contracts, and the people would have no protection left. This is especially true with refer-

113      ence to the municipalities created by legislative authority.

Contracts such as the one under consideration affecting the interests of the people and imposing exactions and burdens upon them may be honestly and fairly entered into and at the time of their execution be equitable and just, and yet before the lapse of fifty years or a fourth of that time, by reason of changed conditions, become inequitable, unjust and oppressive upon the people on whom the exaction is laid, and it is for this very reason that the people have reserved to themselves the power to regulate and prescribe the method of fixing rates in such matters. This principle is peculiarly applicable to a person who undertakes the discharge of a public duty or who undertakes a business or engagement to serve the public for private gain. The foregoing provisions of the constitution were as much a part of Murray's contract with the city of Pocatello as if they had been written bodily into the contract. The ordinance of the city could not abrogate them and should be read in the light of and subject to the supreme law of the state. It is clear to our minds that the city had no authority whatever to enter into a contract with defendant providing a schedule of rates to be charged for supplying water to the inhabitants of the city or providing a manner and method of subsequently fixing and determining rates which would run counter to any statute then in force or to any statute that the legislature in the exercise of its constitutional powers might subsequently adopt. This ordinance should be read and understood as providing only a temporary method of ascertaining and fixing rates to remain in force and effect until such time as the supreme lawmaking power of the state, in the exercise of the duty imposed upon it by the constitution, might from time to time prescribe the manner and method of determining such rates. The legislature ac-

114      cordingly by act of March 16, 1907, amending Sec. 2711 of the Rev. Stats. of 1887, which amendment is now Sec. 2839

of the Rev. Codes, prescribed the manner and method of establishing rates to be charged by persons supplying water to cities and towns. This was not an impairment of the contract, and therefore in violation of Sec. 10, art. 1, of the constitution of the United States, nor can it be said that it is a taking of defendant's property without due process of law in violation of Sec. 1 of the Fourteenth Amendment to the federal constitution.

In *Jack v. Village of Grangeville*, 9 Ida. 291, this court held that under subd. 12 of Sec. 2230 of the Revised Statutes of 1887 and the acts of February 17th and March 1, 1893, (1893 Sess. Laws, 34 and 97) a village had the power and authority to contract for a supply of water, and attention was there specifically called to the provisions of Sec. 6, art. 15 of the constitution and the fact that the legislature had not yet provided a method by which rates or compensation could or should be ascertained and fixed,—“except as to water and canal corporations,” and that, “Until the legislature provides a method for fixing rates, the contract between the parties will govern.” The syllabus to the *Jack* case was written by the court, and we find the following statements of law contained in paragraphs 7 and 8 thereof:

“7. Under section 6, article 15, state constitution it is the duty of the legislature to provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold for or rented for a useful or beneficial purpose, and until that is done the owner and user may make such contracts therefor as may to them seem just and reasonable.”

“8. Under the laws of this state, such a contract as that under consideration may be made to continue for thirty years, except that rates may be established from time to time as the legislature may by law provide.”

In the case at bar, there is no doubt but that under the provisions of the act of February 10, 1899, (1899 Sess. Laws, p. 192) and particularly section 39 thereof, the city of Pocatello had the power and authority to pass an ordinance and enter into a contract with defendant for the establishment of a water system and supplying water to the city and its inhabitants, but any such contract as it was within the power of the city to make was subject always to the power and authority of the legislature to prescribe a method of determining and establishing reasonable, maximum rates to be charged as water rental.

At the time of entering into this contract and at all times since and now, the defendant has had and still has the assurance of the whole people of this commonwealth, expressed through their constitution, (Sec. 6, Art. 15), that the rates to be established shall always be “reasonable maximum rates.” The assurance that the defendant shall always be allowed to charge and collect “reasonable maximum rates” is a guaranty given him by the state that his property shall not and will not be taken without due process of law and that he will be entitled and allowed to collect such rates as will guarantee to him a reasonable profit and income on his investment. He has no vested right to charge an unreasonable or an uncon-

unconscionable rate while exercising a franchise to serve a public use. To deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate or unconscionable rate deprives him of no right, natural or acquired, and cannot be the impairment of a contract within the purview and meaning of Sec. 10, art. 1, of the federal constitution, nor is it depriving him of property without due process of law in violation of the Fourteenth Amendment.

116 Sec. 5 of the ordinance above quoted prescribes the method of selecting a commission for the purpose of ascertaining the value of the plant and system in the event it should be desired to re-establish rates. The method therein provided is wholly immaterial for the purpose of this decision, so long as it provided a method different from that prescribed by the statute. It is noteworthy, however, that the method therein prescribed is unique and unjust. It enumerates the things that should be taken into consideration and be valued, and among others specifies "rights of way, natural and acquired advantages, franchises." Now by the statute of this state, rights of way for such purposes are granted over all public highways without requiring any compensation whatever (Sec. 2840, Rev. Codes) and this was true with reference to the franchise within the corporate limits of Pocatello to construct the system, and notwithstanding this fact, these rights of way and this franchise were to be valued and assessed for the purpose of determining rates to be charged. In other words, Murray proposed to collect rates sufficient to make a 5% income on the value of rights of way and franchises that the public had given him.

It is also provided by sec. 3 of the ordinance that no readjustment of rates should ever be made that would yield less than 5% above reasonable expenses on the value of the investment as ascertained by the provisions of Sec. 4. Now 5% income on the entire investment was probably reasonable and fair when Pocatello was a mere village and the defendant had a comparatively small amount of money invested. But as the village has grown into a city of some ten thousand or more inhabitants and the defendant has invested several times the original amount of money in extending and enlarging his water system, 5% on so large an investment might be excessive. The amount of the investment, the conditions of the times,

117 the extent of the use or the number of consumers, the permanence and security of the investment, are all elements that would enter into the question of what would constitute a reasonable income. It is notorious that men who have money to loan or invest expect and demand a higher rate of interest on a small investment than they do on a large investment, the security being sufficient and adequate in each instance. For such reasons, the power ought to always rest in the people or the lawmaking power to re-establish and readjust rates from time to time in order to meet the changed conditions. It is also noteworthy that the commissioners provided for by the ordinance all come from one class and may not and probably could not be citizens of Idaho or subject to

the jurisdiction of our courts or process, and that no provision is made for the enforcing any action by such commission.

The views hereinbefore expressed are to our minds quite conclusively supported by authorities to which we will briefly call attention.

In *City of Tampa v. Tampa Water Works Co.*, 34 So. 631, 45 Fla. 600, the city of Tampa entered into a contract and passed ordinances authorizing the predecessors of the Water Works Co. to construct a water system and agreed to pay the company fixed rates for the use of hydrants for city purposes for a period of thirty years, and also fixed a schedule of maximum rates to be charged private consumers for the full period of thirty years. At the time of the passage of the ordinances and entering into the contract, the state of Florida had not adopted a statute prescribing maximum rates to be charged in such cases or prescribing a method of fixing or establishing such rates, but subsequently the legislature passed an act authorizing municipalities of the state to adopt ordinances fixing reasonable rates to be charged to the municipality and its inhabitants. In accordance with the authority of that statute, the city council passed an ordinance fixing maximum rates to be charged by the water works company and these rates were lower than the rates which had been previously fixed by ordinance and contract. The water works company sought to enjoin and restrain the enforcement and execution of this ordinance as a violation of its contract rights and as an attempt to take its property without due process of law. The city relied on the provisions of Sec. 30, Art. 16, of the state constitution, which declared that, "the legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discriminations and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures." The court held that the provisions of the constitution must be read into the ordinance and contract and that it became a part of the contract between the city and the water company and that the company had accordingly taken its franchise and constructed its plant and system with the understanding and notice that the power continuously rested in the legislature to enact a law regulating charges and providing for the establishment of maximum rates to be charged by any person, company or corporation performing such a service or exercising such a public use. Among other things, the court said:

"The power mentioned in this section is full power; a continuing, ever-present power. Being irrevocably vested by this section, the legislature cannot divest itself of it. Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power cannot exist, if by contract that power can be curtailed or impaired \* \* \*

But every charter granted and every contract made by the legis-

lature, or by a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent excessive charges, which by this section is unalterably and irrevocably vested in the legislature. The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the legislature to bind itself, either by a contract of its own making or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary so to do. The effect of this section is to reserve to the legislature full power at all times, notwithstanding any supposed contract not to exercise it, to require water companies and others mentioned in the section to comply with their common-law obligation to supply their customers at reasonable rates; and, such being its construction, we do not see that the contract between the water company and the city is impaired by the ordinance of December 20, 1901, nor that the water company is thereby deprived of its property without due process of law."

This case was subsequently taken by writ of error to the Supreme Court of the United States, and the judgment and decree of the supreme court of Florida was affirmed. (*Tampa Water Works Co. v. Tampa*, 199 U. S. 241, 50 L. Ed. 170). Mr. Justice Holmes in affirming the judgment of the supreme court of Florida and commenting on the constitutional provision heretofore quoted, said:

"It says that the power shall be 'full power;' and the adjective may be read as meaning a power which cannot be cut down. 120 When it goes on to require that the legislature 'shall' provide for enforcing the laws which it is expected to pass for the correction of abuses and the prevention of excessive charges, the argument is strengthened that it means to impose a duty which the legislature is not at liberty to give up. Such was the opinion of the supreme court of Florida, and we have yielded to the judgment of the state court upon more doubtful questions than this.

"The case stands on the single ground of contract. There is no allegation that the rates fixed by the new ordinances are unreasonable, or that their effect will be to destroy or considerably impair the value of the plaintiff's property. Although the 14th Amendment is invoked, no case is made out under it on any ground than that the obligation of a binding contract is impaired."

In *Home Telegraph and Telephone Co. v. Los Angeles*, 241 U. S. 265, 53 L. Ed. 176 (in trial court 155 Fed. 554), the city of Los Angeles had granted to the telephone and telegraph company a franchise and had passed an ordinance fixing maximum rates which the company might charge during the life of the franchise. Subsequently the city passed an ordinance which it was conceded was within the powers conferred by Sec. 31 of the city charter. This latter ordinance fixed a new and different method of determining rates and "required every person, firm or corporation supplying telephone service to furnish annually to the city council a statement of the revenue from, and expenditures in, the business, and an itemized inventory of the property used in the business, with



its cost and value; and provided a penalty for charges in excess of the rates fixed." The company commenced its action in the Circuit Court of the United States for the purpose of having the city restrained and enjoined from enforcing this ordinance. The  
121 Circuit Court denied the application (155 Fed. 551), and its judgment was affirmed by the Supreme Court. In discussing the scope of the original ordinance and contract and the power of the city to fix unalterable rates to be maintained during the entire term of the franchise, the court said:

"The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power "by ordinance \* \* \* to regulate telephone service and the use of telephones within the city \* \* \* and to fix and determine the charges for telephones and telephone service and connection. This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else."

Further on in the opinion, addressing himself to the objection that the ordinance was in conflict with the due process clause of the Fourteenth Amendment to the federal constitution, the court said:

"The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the 14th Amendment of the Constitution of the United States, because the  
122 section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate legislation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner v. Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 798), would not seem to be indispensable."

In passing, we will here digress and incidentally note a further objection which was made on the oral argument in this case, since that objection is squarely met in the *Home Tel. & Teleg. Co.* case, *supra*. The objection was made that our statute, Sec. 2839, Rev. Codes, provides that the commissioners appointed shall be "taxpayers of the city" and that such a commission would not be a fair, impartial and unprejudiced tribunal, for the reason that they would be in a measure passing upon their own case. In considering a like objection in the *Home Tel. & Teleg. Case*, the court said:

"The appellant further insists that the city council is not an impartial tribunal because, in effect, it is a judge in its own case. It

is too late, however, after the many decisions of this court which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition."

Returning to the main question, there is perhaps no case that more clearly states the underlying principle involved in this case than the case of *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, wherein the Supreme Court of the United States considered the effect of an act of Congress upon a previously made contract which was in all respects legal and valid at the time it was entered into. While that case was dealing with the effect of an act of Congress and the power conferred by the constitution on Congress to legislate in regulating interstate commerce and in that respect differs from the case at bar, still the principle discussed by the learned justice in that opinion and to which all the justices of that court gave their assent, is so apt and nearly identical with the principle of law here involved, as we understand it, that the opinion in that case has peculiar force and binding effect here. It is also one of the most recent expressions of that court on this principle of law. In the latter case, the Mottleys in 1871 entered into a contract with the L. & N. R. Co. whereby they agreed to and did relinquish their claim against the company for damages sustained in a collision, and in consideration thereof the company agreed to annually thereafter during the lifetime of the Mottleys issue to them annual passes over the company's entire railway system, either then constructed or that might be subsequently constructed by the company, and in accordance with this agreement the company continued to issue annual passes to the Mottleys until 1907. In the latter year, the company refused to issue any further passes under the agreement for the reason assigned by the company that it was prohibited from doing so by the provisions of the interstate commerce act of Congress of June 29, 1906, (34 Stat. at Large, 838, U. S. Comp. Supp. 1909, p. 1169). The Mottleys thereupon instituted a suit to compel the railroad company to comply with its contract and issue passes. The state circuit court entered a judgment requiring the railroad company to issue to the Mottleys the passes in accordance with the contract of 1871, and upon appeal to the court of appeals of the state of Kentucky, the judgment was affirmed. (118 S. W. 982, 133 Ky. 652.) The judgment of the state court was reversed on writ of error to the Supreme Court of the United States. The court reviewed a number of previous decisions of the Supreme Court and quoted with approval from the *Addyston Pine* case, 175 U. S. 211, 44 L. ed. 136; and *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126; *Union Bridge Co. v. U. S.*, 204 U. S. 361, 51 L. Ed. 523; and *Fitzgerald v. Grand Trunk R. R. Co.*, decided by the supreme court of Vermont (63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76).

After considering the foregoing and other cases, the court said: "These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility

that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the constitution never intended any such state of things to exist.

"It is said that if Congress intended by the commerce act to embrace such a case as this, then the act is repugnant to the constitution. Does the act infringe upon the constitutional liberty of the citizen to make contracts? Manifestly not \* \* \*.

"These authorities and principles condemn the proposition that the defendants in error had the constitutional right, pursuant to or because of the agreement of 1871, and during their respective lives, to accept and use free transportation for themselves, as passengers, on an interstate train, after Congress forbade, under penalty, any interstate carrier to demand, collect, or receive compensation for transportation, or any interstate passenger not within the

125 clauses excepted by the act, to use transportation tickets, except upon the basis fixed by the carrier's published schedule of rates. After the commerce act came into effect, no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. It is not determinative of the present question that the commerce act, as now construed, will render the contract of no value for the purpose for which it was made."

Supporting the foregoing discussion, the court quotes from the *Addyston Pine case* the following: "We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts." And, again further on in the course of the discussion, the learned judge quotes the following from the same case:

"The provision in the constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right, to regulate commerce among the states. \* \* \* Any thing which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

In the same opinion (the *Mottley case*) the court quoted from the *Legal Tender Cases* (12 Wall, 550; 20 L. Ed. 311) wherein the court had said: "As, in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no

126 obligation of a contract can extend to the defeat of legitimate government authority."

Many other authorities might be cited to the same effect as the foregoing, but the most of them will be found collated and analyzed

in the foregoing opinions and their repetition here can add no additional weight to the principle we gather from them.

The defendant cites a great many cases wherein it has been held that certain legislative or municipal action taken tended to impair the obligations of previously existing contracts, and that such state or municipal action was therefore void and ineffectual. Defendant seems, however, to place his chief reliance on *City of Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 44 L. Ed. 886; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *City of Pocatello v. Murray*, 173 Fed. 382; and *Los Angeles Water Co. v. City of Los Angeles*, 103 Fed. 711.

The case of *City of Los Angeles v. Los Angeles City Water Co.* and the case of *Los Angeles City Water Co. v. City of Los Angeles*, both involved the validity of a contract entered into on the 22d of July, 1868, between the city of Los Angeles on the one side and certain parties on the other, whereby the city leased its water works to the persons named and their assignees for a term of thirty years, and granted the right to lay pipes in the streets of the city and to sell and distribute the water for domestic purposes to the inhabitants of the city and the right to take water from the Los Angeles river for such purpose. The city also bound itself by that contract not to make any other lease, sale, contract, grant or franchise to any person or persons, corporation or company for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract. They also contracted that the city

127 would not reduce the water rates lower than the rates that were being charged at the time the contract was entered into.

The first of the above named cases held that under the constitution and statute of California, as the same had been construed by the supreme court of the state prior to the date the contract was entered into and the franchise was granted, the legislature had the right to grant a special franchise to persons and corporations and that the legislature had by act of 1870 ratified and approved the contract which had been previously entered into by the city of Los Angeles and that this became a valid and binding contract upon the city for the full period of thirty years. (See comment of Mr. Justice White on *Los Angeles* case in dissenting opinion in *Rogers Park Water Co. v. Fergus*, 180 U. S. 629, 45 L. Ed. 706.) The other *Los Angeles* case above cited, involving the same ordinance, held that after the expiration of the thirty-year period the city was still bound by the contract until such time as it took steps in conformity with the contract to abrogate and terminate the same, and that the city could not take possession of the water works system until it had first paid or tendered to the company the value of the improvements made in the system as the same might be agreed upon or determined in the manner prescribed by the contract and in pursuance of law. It should be observed that in neither of those cases was there involved either a constitutional or statutory provision such as we have under consideration in this case. In other words, there was no such provision either in the constitution or statute in force in California at

the time the contract of 1868 was entered into by the city of Los Angeles.

In the *City of Walla Walla v. Walla Walla Water Co.*, the city of Walla Walla in March, 1887, passed an ordinance granting  
128 a franchise to the Walla Walla Water Co. to construct and maintain a water system within the city, and for that purpose to lay pipes and mains and collect rates, and agreeing to make certain payments to the company for the use of water and, among other things, stipulated and agreed that the city should not erect or maintain or become interested in any water works system during the period of the franchise which ran for twenty-five years. Subsequently the city began taking the necessary steps in conformity with its charter to create a bonded indebtedness for the purpose of raising money to erect and maintain a water works system, and the water company filed its bill praying for an injunction restraining the city from taking further action looking to the erection or maintenance of a water works system, and relied upon the ordinance and contract previously granted to the water company. The case went to the Supreme Court of the United States, and the court rested its decision upon the provisions of Sec. 10 and Sec. 11 of the charter of the city of Walla Walla. By Sec. 10, it was authorized to grant to any person or association the right to use the streets of the city for the purpose of laying pipes and supplying water for a period of twenty-five years; and by Sec. 11, the city was authorized to erect and maintain water works within the city or to authorize the erection of the same for the purpose of furnishing the city and its inhabitants with a supply of water. The court held in effect that these grants of power were not concurrent powers, but rather alternative, and that the exercise of the power to contract with others to construct and maintain water works was in spirit and effect an agreement that the city itself would not erect a system during the period covered by the grant and franchise to others. The court  
129 held in effect that the doing of the one thing exhausted the power to do the other. This conclusion was based upon the theory that for the city to construct its own system would practically destroy and render worthless the system of the company erected under the contract and would thereby impair the contract.

The case of *City of Pocatello v. Murray* has already been adverted to in this opinion. It is clear that the observations of the learned judge in that opinion were not essential to the determination of the case and that the case was not disposed of on that point. On the other hand, it is equally clear that the provisions of our constitution were not called to his attention or considered by him.

As we view the matter, none of the cases relied on by defendant are directly in point in this case, nor do they support the position taken by the defendant.

The plea of another action pending is not sufficient to either require or justify an abatement of this action. The action pleaded was commenced in the district court in and for Bannock county and was transferred to the Circuit Court of the United States for the district of Idaho, and is now pending in that court. It appears from

the answer that that action was instituted for the purpose of procuring a decree declaring the franchise granted by ordinance No. 86 forfeited and void by reason of the failure of defendant Murray to comply with the terms and conditions of the ordinance and franchise. It will therefore be seen at once that the action now pending in the Circuit Court of the United States involves an entirely different question from the one here presented.

We conclude that the complaint states a cause of action and that the demurrer thereto should be overruled and that the answer to the complaint does not state facts sufficient to constitute a defense and that the demurrer should be sustained. The writ will issue in accordance with the prayer of the complaint. Costs awarded to plaintiff.

Stewart, C. J., and Sullivan, J., concur.

130 In the Supreme Court of the State of Idaho.

THE CITY OF POCA TELLO, a Municipal Corporation, Plaintiff,  
vs.  
JAMES A. MURRAY, Doing Business as The Pocatello Water Com-  
pany, Defendant.

*Affidavit.*

STATE OF IDAHO,  
County of Bannock, ss:

P. C. O'Malley, being first duly sworn, deposes and says: that he is a citizen of the United States over the age of 21 years; that on the 3rd day of February, 1912, he personally served the attached peremptory writ of mandate on the defendant James A. Murray by delivering to and leaving with Geo. E. Gray, Esq., one of the Attorneys for said defendant at Pocatello, Bannock County, Idaho, a certified copy of said writ to which was attached a certified copy of the order herein directing how said writ should be served; also by delivering to and leaving at the office of Pocatello Water Company, at Pocatello, Bannock County, Idaho, with Mr. Alex. Murray, a person over the age of twenty-one years employed in said office, a certified copy of said writ and a certified copy of said order above referred to; also by depositing in the United States Post Office at Pocatello, Idaho, as registered mail with postage prepaid thereon, an envelope addressed to said defendant James A. Murray, at Butte, Montana, which said envelope contained a certified copy of said writ and a certified copy of said order above referred to.

(Signed)

P. C. O'MALLEY.

Subscribed and sworn to before me this 3d day of February, 1912.

(Signed)

[SEAL.]

EZRA J. MERRILL.

Notary Public.

132

In the Supreme Court of the State of Idaho.

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

*Peremptory Writ of Mandate.*

The People of the State of Idaho to James A. Murray, doing business as "Pocatello Water Company," Defendant above named, Greeting:

Whereas, it manifestly appears to us by the affidavit of J. M. Bistline, made and filed herein on behalf of the Plaintiff, the City of Pocatello, the party beneficially interested, that on the 6th day of July, 1911, said Plaintiff by resolution duly passed by its City Council declared that the rates and charges for water furnished to said city and the inhabitants thereof by you the said Defendant are unfair, unreasonable and unjust, and that said City Council on said date by resolution duly appointed two commissioners, taxpayers of said City of Pocatello, to act with commissioners to be appointed by you the said defendant to fix and determine the rates to be charged for water and water service furnished by you to said city and its inhabitants, and

Whereas, it further appears that notice of the appointment of said commissioners by said City of Pocatello was within the time fixed by law duly served upon you together with a request that you

133 appoint two commissioners, taxpayers of said City of Pocatello, to act with the said commissioners so appointed by said City of Pocatello to fix and determine the rates to be charged for water furnished to said city and its inhabitants by you the said Defendant, and

Whereas, it manifestly appears that you have failed, refused and neglected and still fail, refuse and neglect to appoint said commissioners in accordance with said request of said City of Pocatello and as provided by Section 2839 of the Revised Codes of Idaho, 1909, and that there is not a plain, speedy or adequate remedy for the Plaintiff in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this Writ you do appoint two commissioners, taxpayers of the City of Pocatello, to act with said commissioners heretofore appointed by said City of Pocatello to fix and determine the rates to be charged for water furnished by you to said city and the inhabitants thereof, as provided in said Section 2839, Revised Codes of the State of Idaho.

Witness, the Honorable George H. Stewart, Chief Justice of the Supreme Court of the State of Idaho, in the City of Boise, County of Ada, and the seal of said court this 30th day of January, 1912.

[SEAL.]

(Signed)

I. W. HART, Clerk.

Indorsed: Filed on return this 5th day of February, 1911. I. W. Hart, Clerk.

134 In the Supreme Court of the State of Idaho.

CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
vs.

JAMES A. MURRAY, Doing Business as Pocatello Water Company,  
Defendant.

*Order Directing How Peremptory Writ of Mandate Shall be Served.*

It appearing from the affidavit of J. M. Bistline filed herein on behalf of the plaintiff, that the defendant James A. Murray is a non-resident of the State of Idaho, and a resident of the City of Butte in the State of Montana, and it further appearing that said James A. Murray is not now within the state of Idaho, and that it is altogether uncertain when he will be within the State so that service of the peremptory writ issued herein may be made upon him personally; and it further appearing from the said affidavit of said J. M. Bistline that the plaintiff is in urgent need of immediate relief in the matter of water rates, and charges to said City of Pocatello, and the inhabitants thereof by an adjustment and determination of said rates in accordance with the judgment herein;

It is hereby ordered that the peremptory writ of mandate issued in this cause be served by the delivery of a certified copy thereof to the person in charge of said defendant's office situated in the City of Pocatello, or by leaving a certified copy of said writ at the office of said Pocatello Water Company in the City of Pocatello, Blaine, Bannock County, Idaho, with some person of lawful age employed therein, and by mailing a certified copy of said writ to the said defendant by registered mail addressed to him at Butte, Montana, and by serving a certified copy of said writ upon one of the attorneys for said defendant.

It is further ordered that a certified copy of this order be served with the writ.

Done in open court this second day of February, 1912.

(Signed)

GEO. H. STEWART.

Chief Justice.

Indorsed: Filed Feb. 2, 1912. I. W. Hart, Clerk.

136 In the Supreme Court of the State of Idaho.

THE CITY OF POCATELLO, a Municipal Corporation, Plaintiff,  
v.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

*Petition for Writ of Error.*

To the Honorable Joseph McKenna, Justice of the Supreme Court of the United States:

The petition of James A. Murray, doing business as the Pocatello Water Company, respectfully shows:



That, heretofore, to wit, on the 25th day of September, 1911, there was filed by the City of Pocatello, a municipal corporation, in this, the Supreme Court of the State of Idaho, an application, duly supported by affidavit, praying that a writ of mandate issue out of this court commanding the defendant, James A. Murray, to appoint commissioners to act with commissioners already appointed by said plaintiff, as provided in Section 2839 Revised Codes of Idaho, 1909,

137 for the purpose of determining the rates to be charged for water furnished to the said City of Pocatello for fire purposes and the sprinkling of streets and to the inhabitants thereof for domestic uses and the watering of lawns.

That, thereupon, an alternative writ of mandate was issued commanding your petitioner, defendant in said proceeding, to immediately appoint two commissioners, taxpayers of the city of Pocatello, to act with the commissioners theretofore appointed by said City to fix and determine the rates to be charged for water furnished to said City and to the inhabitants thereof, or to show cause before said Supreme Court, at the Court Room thereof, on the 4th day of December, 1911, why he had not done as commanded.

That, thereafter, your petitioner appeared by his counsel and demurred to said affidavit and petition for writ of mandate theretofore filed upon the ground that said affidavit and petition did not state facts sufficient to constitute a cause of action or to entitle plaintiff to the appointment of commissioners or to the relief demanded in the petition; that it appeared from said affidavit and petition that the court is without jurisdiction of the person of the defendant and without jurisdiction of the subject matter of said suit.

That, on the same day, your petitioner, as defendant in said action, filed his motion to quash the alternative writ of mandate theretofore issued in said cause, basing said motion upon the same grounds as heretofore stated as the basis of the demurrer to said petition and upon the following additional grounds, to wit:

That the said affidavit and petition fails to show that plaintiff has complied with the conditions of the ordinance and contract  
138 set out in the complaint to entitle it to the, or any, relief, as prayed for.

That it appears from said affidavit and petition that the act of the legislature upon which plaintiff relies in this proceeding in its demand for the appointment of commissioners to fix water rates was enacted subsequent to the passage and approval of the ordinance set out in said affidavit and petition and subsequent to the acceptance of the conditions of said ordinance by this defendant; that, as to the said contract, said statute of Idaho is ineffective, inoperative and void and that the application of the same, as prayed for in this proceeding, requiring defendant to appoint commissioners for the purpose of fixing water rates to be charged under the terms of said ordinance referred to, is contrary to, and in contravention of, the constitution of the United States, Art. I, Sec. 10, which provides that no state shall pass any law impairing the obligation of any contract; as also contrary to, and in contravention of, the fourteenth amendment to

the constitution of the United States, providing that no person shall be deprived of property without due process of law.

That, at the time of the filing of said demurrer and motion to quash, your petitioner filed his answer denying certain of the material allegations contained in said affidavit and petition for writ of mandate and setting up three several and additional defenses to said application, such additional defenses being to the effect:

(1) That the ordinance of the City of Pocatello, attached to, and made a part of, the affidavit and petition of plaintiff for writ of mandate, had been duly accepted by the said James A. Murray, the party named therein, who had thereupon expended large sums of money in extending and improving the water system referred to; that said ordinance so accepted and acted upon constituted a contract between the City of Pocatello and said Murray not subject to be impaired or affected by any law of the State of Idaho enacted subsequent to the date of the said ordinance, and particularly the act of the legislature of the State of Idaho approved March 16, 1907, and subsequently enacted as Section 2839 of the Revised Codes of the State of Idaho, being the act providing for the appointment of commissioners for the purpose of establishing maximum rates to be charged for water furnished to the inhabitants of cities and villages and being the act relied upon by said plaintiff in its application for writ of mandate. That said ordinance contained provisions respecting the fixing of rates constituting a contract between the said city and Murray, which provisions, the said plaintiff was seeking to avoid and ignore. That the action proposed and attempted by said City was in violation of the terms of said contract and the said act of the legislature of the State of Idaho, relied on by plaintiff as justifying its demand for the appointment of commissioners to fix rates, was and is repugnant to the provisions of Art. 1, of Sec. 10, of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and is contrary to, and in contravention of, Section 1 of the fourteenth amendment to said constitution providing that no person shall be deprived of property without due process of law.

(2) As a further and separate answer, your petitioner, set out that, in an action brought in the Circuit Court of the United States in the District of Idaho, by the said City of Pocatello against James A. Murray, which said action was tried, determined and decided prior to the filing of the affidavit and petition for writ of mandate in this case, the question of the right of the said City of Pocatello, under the provisions of the said act of the legislature of the State of Idaho hereinbefore referred to, to require said Murray to appoint commissioners to fix the rates to be charged the said City of Pocatello and its inhabitants by said Murray, as the Pocatello Water Company, was directly in issue and it was decided that said act of March 16, 1907, Revised Codes of Idaho, Sec. 2839, had no application to the fixing of rates to be charged by your petitioner for water furnished to said City of Pocatello and its inhabitants, but that the parties to said ordinance were, in the matter of fixing the said rates, governed by the provisions of the ordinance

of said city, being the ordinance referred to and accompanying the petition for writ of mandate in this case.

(3) Your petitioner made further answer to said application for writ of mandate that there is another action pending between the same parties in the Circuit Court of the United States for the District of Idaho, wherein the said City of Pocatello, as plaintiff, seeks a decree annulling the said ordinance of the City of Pocatello referred to in the petition.

That, to said answer, plaintiff demurred generally upon the ground that the same did not state facts sufficient to constitute a defense or show sufficient cause why a writ of mandate should not issue and demurred specifically to each of the defenses set up in said answer upon the same grounds as last stated.

141 That, upon the issues of law thus joined, the said cause was presented and argued before the Court and was taken under advisement. Whereupon, on the 18th day of January, 1912, the said Court entered an order overruling the demurrer to the affidavit and petition for writ of mandate and denying the motion of your petitioner to quash the same; also sustaining the demurrer interposed by the City of Pocatello to the answer of the defendant, your petitioner, and ordered that a peremptory writ of mandate issue under the seal of the court directed to defendant in accordance with the prayer of the complaint.

Petitioner further shows that said judgment of said Supreme Court was and is a final judgment in the highest court of the State of Idaho.

Petitioner further shows that a federal question was made in said cause by the assertion and claim on the part of the City of Pocatello that the provisions of the act of the legislature of March 16, 1907, Revised Codes Sec. 2839, hereinafter referred to, applied in the matter of fixing the rates to be charged for water furnished and to be furnished to the said City of Pocatello and its inhabitants, under the provisions of the ordinance referred to, and that said act of the legislature made it incumbent upon your petitioner to join with the said city in the appointment of commissioners, notwithstanding the provisions of said ordinance fixed the rates to be charged and prescribed the conditions under which a readjustment or fixing of rates could be had.

That said judgment and decision of said Supreme Court is repugnant to, and in conflict with, the constitution of the United States.

Art. 10, Sec. 1, which forbids any state to pass a law impairing the obligation of contracts, and contrary to, and in contravention of, Sec. 1 of the fourteenth amendment to the said constitution; that the decision of said federal question was necessary to the judgment rendered in said cause or proceeding.

142 The said Supreme Court of the State of Idaho erred in holding and deciding that the prior judgment of the Circuit Court of the United States District of Idaho between the same parties, and which judgment was pleaded and relied on by defendant as a bar to this suit, action or proceeding did not constitute such bar contrary to, and in

contravention of, the full faith and credit clause of the Federal Constitution.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho and the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by the petitioner may be examined and corrected and the said judgment of the Supreme Court of the State of Idaho be reversed, and a judgment entered for the defendant, and for costs.

JAMES A. MURRAY,

*Petitioner,*

By GEORGE E. GRAY,

*Pocatello, Idaho;*

NORMAN M. RUICK,

*Boise, Idaho,*

*Attorneys for Plaintiff in Error.*

143 SUPREME COURT OF THE UNITED STATES, *ss.*:

Let the Writ of Error issue upon the execution of a Bond by James A. Murray to the City of Pocatello in the sum of Fifteen thousand dollars, said bond, when approved, to act as a supersedeas.

Dated February 6th, 1912.

JOSEPH McKENNA,

*Associate Justice of the Supreme Court  
of the United States.*

144 [Endorsed:] In the Supreme Court of the United States  
The City of Pocatello, a municipal corporation, Plaintiff, vs.  
James A. Murray, doing business as the Pocatello Water Company,  
Defendant. Petition for Writ of Error. Filed Feb. 12, 1912.  
I. W. Hart, Clerk Supreme Ct. of Idaho. Norman M. Ruick,  
Lawyer, 515-516-517 Overland Building, Boise, Idaho, Attorney for  
Defendant, Plaintiff in Error.

145 In the Supreme Court of the State of Idaho.

THE CITY OF POCA TELLO, a Municipal Corporation, Plaintiff,

vs.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

*Assignment of Errors.*

Now comes the above named defendant and files herewith his Petition for Writ of Error and says that there are errors in the record and proceedings in the above entitled case and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment.

The Supreme Court of the State of Idaho erred in holding that the Act of the Legislature of the State of Idaho, approved March 16, 1907, Laws Idaho 1907, p. 555, Revised Codes Idaho 1909, Sec. 2839, was valid. The validity of said act was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Idaho erred in holding and deciding:

146 First. That said Act, as applied to this defendant, did not deprive him of property without due process of law, contrary to the fourteenth amendment of the Federal Constitution.

Second. That said Act of the Idaho Legislature, as applied to this defendant, did not impair the obligation of contracts, contrary to the provisions of Article I, Section 10, of the Federal Constitution.

Third. That said Act of the Legislature of the State of Idaho, as applied to the fixing of rates to be charged for water furnished and to be furnished by defendant to the City of Pocatello under the provisions of the ordinance of said City of June 6, 1901, did not impair the obligation of contracts contrary to the provisions of Article I, Section 10, of the Federal Constitution.

Fourth. That said Act of the Legislature of the State of Idaho, as applied to the fixing of rates to be charged for water furnished and to be furnished by defendant to the city of Pocatello pursuant to, and under, the provisions of the ordinance of said City, of June 6, 1901, did not deprive him of property without due process of law, contrary to the fourteenth amendment of the Federal Constitution.

Fifth. That said Act of the Legislature, as applied to this defendant, and to the matter of rates to be charged for water furnished and to be furnished by defendant to said City of Pocatello and its inhabitants under and pursuant to the provisions of said ordinance of said City, did not, contrary to the provisions of Section 10, Article I, of the Federal Constitution, impair the obligation of contracts, in requiring defendant to appoint, pursuant to the provisions of said act of the legislature, commissioners to determine rates, not

147 in accordance with the provisions of, and in the manner provided by said ordinance; and without a compliance by said City with the conditions of said ordinance relative to ascertaining by a committee of engineers the value of said water system preliminary to and as a basis for a determination of rates.

Sixth. That said Act of the Legislature, as applied to this defendant, and to the matter of rates to be charged for water furnished and to be furnished by defendant to said City of Pocatello and its inhabitants under and pursuant to the provisions of said ordinance of said City, did not, contrary to the provisions of Section 1 of the fourteenth amendment to the Constitution of the United States, deprive defendant of property without due process of law, by requiring defendant to appoint, pursuant to the provisions of said act of the legislature, commissioners to determine rates not as and in the manner provided by said ordinance; and without a compliance by said City with the conditions of said ordinance relative to ascertain-

ing by a committee of engineers the value of said water system preliminary to, and as a basis for, a determination of rates.

The Supreme Court of Idaho erred in holding and deciding:

Seventh. That the facts set out in the affidavit for writ of mandate in said cause are sufficient to constitute a cause of action and to entitle the plaintiff therein to the appointment of commissioners, as prayed for,—which decision was, and is, contrary to the provisions of the Federal Constitution, Article I, Section 10, and of Section 1 of the fourteenth amendment to the same.

148 Eighth. That the matters and things stated in said affidavit for writ of mandate were sufficient to entitle the plaintiff, City of Pocatello, to the relief demanded, notwithstanding the failure on the part of said city to comply with the conditions of the ordinance, No. 86, of said city, under which the defendant, James A. Murray, as the Pocatello Water Company, was supplying water to said city of Pocatello and its inhabitants, which decision was and is contrary to the provisions of the Federal Constitution, Article I, Section 10, and of Section 1 of the fourteenth amendment to the same.

Ninth. That said Act of the Idaho Legislature, Revised Codes, Section 2839, did not impair the obligation of contracts contrary to the provisions of the Federal Constitution, Article I, Section 10, and did not deprive defendant of his property without due process of law, contrary to the fourteenth amendment thereto, notwithstanding it appeared by the allegations of said affidavit or petition for writ of mandate that, at the time of the application for said writ of mandate, said Murray was supplying water to said city of Pocatello and its inhabitants, and collecting and receiving compensation therefore, under and by virtue of an ordinance, No. 86 of said city, fixing the rates so to be charged, and that said rates, as established by said ordinance, had been in force ever since the date of the taking effect of the same; and that said ordinance provided that, if, after a period of five (5) years, the earnings of said water system of the said Murray should exceed five per cent., above reasonable expenses, of the value of said water system, agreed upon or ascertained as in said ordinance provided, then the rates, as set forth therein, might be readjusted so as to yield not less than five per cent., above reasonable ex-  
149 penses, upon the value; and that plaintiff, in support of said application for writ of mandate, failed to set forth or show that the earnings of said system had, or have, exceeded the limit or amount named in said ordinance as a condition precedent to a readjustment or fixing of any, or different, rates.

Tenth. That said Act of the Idaho Legislature, Revised Codes, Section 2839, did not impair the obligation of contracts contrary to the provisions of the Federal Constitution, Article I, Section 10, and did not deprive defendant of his property without due process of law, contrary to the fourteenth amendment thereto, notwithstanding it appears by the said ordinance, as set out as a part of the affidavit on application for writ of mandate, that, before any readjustment or fixing of rates should be authorized, and before any readjustment or fixing of rates could be required or demanded by said City of Poca-

tello, the earnings of said water system must exceed five per cent., above reasonable expenses, upon the value of the same, as it might be agreed upon between the said City of Pocatello and Murray, or as the same might be ascertained by a committee of engineers, two to be chosen by the said City and two by said Murray, and the four thus chosen to appoint a fifth member; and notwithstanding said affidavit for writ of mandate fails to show a compliance on the part of the said City with either or any of the provisions of said ordinance relative to ascertaining the value of said water system as a condition precedent to, and for the purpose of determining whether, a readjustment of rates was authorized by and according to the contract of the parties, as embodied in said ordinance.

Eleventh. The said Supreme Court of the State of Idaho erred in holding and deciding that the prior judgment of the Circuit Court of the United States, District of Idaho, between the same parties, and which judgment was pleaded and relied on by defendant as a bar to this suit, action or proceeding did not constitute such bar,—contrary to and in contravention of the full faith and credit clause of the Federal Constitution.

For which errors the defendant, James A. Murray, prays that the judgment of the said Supreme Court of the State of Idaho, dated January 18, 1912, be reversed and a judgment entered for the defendant, James A. Murray, and for costs.

GEORGE E. GRAY,

*Residence, Pocatello, Idaho;*

NORMAN M. RUICK,

*Residence, Boise, Idaho,*

*Attorneys for Defendant, James A. Murray.*

151 [Endorsed.] In the Supreme Court of the United States, The City of Pocatello, a municipal corporation, Plaintiff, vs. James A. Murray, doing business as The Pocatello Water Company, Defendant. Assignment of Errors. Filed Feb. 12, 1912. L. W. Hall, Clerk Sup. Ct. of Idaho. Norman M. Ruick, Lawyer, 515-516-517 Overland Building, Boise, Idaho, Attorney for Defendant, Plaintiff in Error.

152 In the Supreme Court of the United States.

THE CITY OF POCA TELLO, a Municipal Corporation, Plaintiff,  
vs.

JAMES A. MURRAY, Doing Business as The Pocatello Water Company, Defendant.

*Supersedeas Bond.*

Know all men by these presents that we, James A. Murray, as the Pocatello Water Company, as principal, and Title Guaranty and Surety Company of Scranton, Pennsylvania, as sureties, are held and firmly bound unto the city of Pocatello, Idaho, in the sum of Fifteen Thousand and 00/100 dollars, to be paid to the said City, to the pay-

ment of which, well and truly to be made, we bind ourselves, each of our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents, sealed with our seals and dated this 26th day of January, 1912.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now, therefore, the condition of the above obligation is such that, if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void. Otherwise to remain in full force and effect

POCATELLO WATER COMPANY,

By GEORGE WINTER, *Superintendent*.

TITLE GUARANTY AND SURETY CO.,

By EARLE C. WHITE, [SEAL.]

*Its Attorney in Fact.*

Signed, sealed and delivered in presence of

L. D. BROWN,

ALEC MURRAY.

STATE OF IDAHO,

*County of Bannock, ss.*

On this 26th day of January, 1912, personally appeared before me, Lorenzo D. Brown, a notary public in and for Bannock County, State of Idaho, Earle C. White, who, by me being first duly sworn, deposes and says that he is the agent of the Title Guaranty & Surety Co., of Scranton, Pennsylvania, that the foregoing instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and the said Earle C. White, agent, acknowledged said instrument to be the free act and deed of the said corporation by authority of its Board of Directors, and the said Earle C. White, agent, acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

LORENZO D. BROWN,

*Notary Public.*

The above bond is approved, February 6, 1912.

JOSEPH McKENNA,

*Associate Justice of the Supreme Court  
of the United States.*

Indorsed: Filed Feb. 12, 1912. I. W. Hart, Clerk.



154

*Certificate of Lodgment.*

SUPREME COURT,

*State of Idaho, ss:*

I, I. W. Hart, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 12, 1912, in the matter of The City of Pocatello, a municipal corporation, versus James A. Murray, doing business as The Pocatello Water Company.

1. The original bond of which a copy is herein set forth.

2. The original and two copies of the writ of error, as herein set forth, one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Boise, Idaho, this 4th day of March, 1912.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,

*Clerk Supreme Court of Idaho.*

155 UNITED STATES OF AMERICA, ss:

To The City of Pocatello, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Idaho wherein James A. Murray, doing business as The Pocatello Water Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this 6th day of February, in the year of our Lord one thousand nine hundred and twelve.

JOSEPH McKENNA,

*Associate Justice of the Supreme Court  
of the United States.*

156 On this tenth day of February, in the year of our Lord one thousand nine hundred and twelve, personally appeared Geo. E. Gray before me, the subscriber, a Notary Public in and for Bannock County, Idaho, and makes oath that he delivered a true copy of the within citation to P. C. O'Malley, City attorney of the City of Pocatello, Bannock County, Idaho, and one of the attorneys of record for the defendant in error, said delivery being at Pocatello, Bannock County, Idaho, on the 10th day of February, 1912.

GEO. E. GRAY.

Sworn to and subscribed the tenth day of February, A. D. 1912.

[Seal M. E. Hughes, Notary Public, Bannock County, Idaho.]

M. E. HUGHES,  
*Notary Public.*

[Endorsed:] No. 1902. In the Supreme Court of the State of Idaho. The City of Pocatello, a Municipal Corporation, Plaintiff & Defendant in Error, v. James A. Murray, doing business as The Pocatello Water Co., Defendant and Plaintiff in Error. Citation. Filed this 12 day of Feb. 1912. I. W. Hart, Clerk.

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*Authentication of Record.*

SUPREME COURT,

*State of Idaho, ss:*

I, I. W. Hart, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The City of Pocatello, a municipal corporation, Plaintiff, versus James A. Murray, doing business as The Pocatello Water Company, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Boise, Idaho, this 4th day of March, 1912.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,

*Clerk Supreme Court of Idaho.*

Endorsed on cover: File No. 23,091. Idaho Supreme Court, Term No. 1015. James A. Murray, doing business as The Pocatello Water Company, plaintiff in error, vs. The City of Pocatello. Filed March 14th, 1912. File No. 23,091.



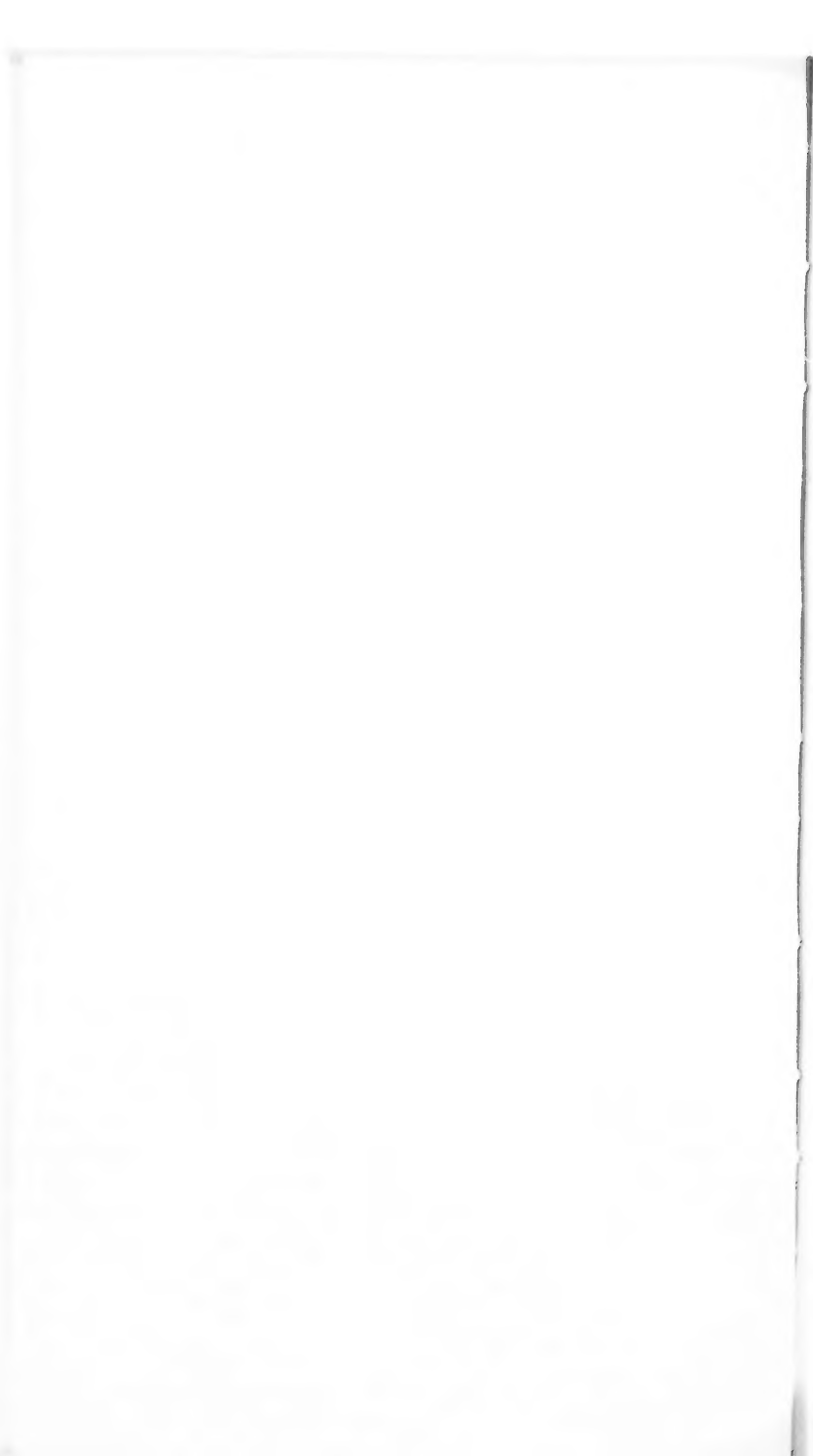
BRIEF OF FACTS IN CASE

EDWARD J. DODGE,  
CLAYTON C. DORRIS,  
WILLIAM V. HODGES,  
Attorneys for Plaintiff in Error.

A. A. HOEHLING, JR.,  
S. M. BUICK,  
Of Counsel.







# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 1015.

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JAMES A. MURRAY, DOING BUSINESS AS THE PO-  
CATELLO WATER COMPANY, PLAINTIFF IN  
ERROR,

VS.

THE CITY OF POCATELLO.

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*In Error to the Supreme Court of the State of Idaho.*

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BRIEF OF PLAINTIFF IN ERROR.

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## STATEMENT.

The plaintiff in error invokes the jurisdiction of the Supreme Court of the United States on writ of error to the Supreme Court of the State of Idaho on two grounds.

First—Because section 2839 of the Revised Codes of the State of Idaho, as enforced by the city council of Pocatello by ordinance of July 6, 1911, and as construed and enforced by the Supreme Court of the State of Idaho, impairs the obligation of contract between the plaintiff in error and the City of Pocatello, contained in Ordinance 86 of June 6, 1901.

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Second—Because the Supreme Court of the State of Idaho, in judicial proceedings terminating in a judgment to which this writ of error is directed, refused to give full faith and credit to a final judgment theretofore entered by the Circuit Court of the United States for the District of Idaho in a suit in equity between the same City of Pocatello as plaintiff, and the same James A. Murray, so doing business as The Pocatello Water Company, as defendant, wherein it was decided that the said section 2839 of the Revised Codes of the State of Idaho did in fact and in law impair the obligation of the said contract contained in said Ordinance 86 of June 6, 1901.

On June 6, 1901, the date of the passage of the said ordinance, the following constitutional provisions and statutes of the State of Idaho were in force:

First—Section 2 of Article XV of the State Constitution, which provides as follows:

“The right to collect rates for compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by the authority of, and in the manner prescribed by, law.”

Second—Section 6 of Article XV of the State Constitution, which provides as follows:

“The legislature shall provide by law the manner in which reasonable maximum rates shall be established, to be charged for the use of water sold, rented, or distributed, for any useful or beneficial purpose.”

Third—Section 2236 of the Revised Codes of Idaho, which provides as follows:

"Cities of the second class and villages governed by this title shall be bodies corporate and politic, may sue and be sued, have a common seal which they may change and alter at pleasure, and such other powers as may be conferred by law."

Fourth—Section 2182 of the Revised Codes of Idaho, which provides as follows:

"Cities of the second class, in their corporate capacities, are authorized to enact ordinances for the following purposes, in addition to other powers granted by this title:  
\* \* \*

4. To make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water."

Fifth—Section 2238 of the Revised Codes of Idaho, which provides as follows:

"In addition to the powers hereinabove granted to cities and villages under the provisions of this title any city may by ordinance or by law \* \* \*

36. Acquire by purchase or otherwise, waterworks or plants, and illuminating plants, to supply the municipality and the inhabitants thereof with water and light.

To prevent and extinguish fires, and for that purpose have power to purchase fire engines, to erect engine houses, to purchase hose carts, hose, hooks, ladders, trucks, buckets, ropes, and all other apparatus, to maintain a fire department, to provide cisterns, hydrants, and water works, or to purchase water for fire purposes from others, and maintain waterworks in such town or village in such manner as the trustees by ordinance determine."

The terms of said Ordinance No. 86 are as follows:

#### ORDINANCE No. 86.

An ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means for ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions, or of granting to others more favorable terms or franchises than that

now held and granted to said James A. Murray.

PREAMBLE.

WHEREAS, The town or village of Pocatello, on the fourth day of January, 1892, conferred and granted to F. D. Toms, John J. Cusick, and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the town or village of Pocatello for the period of fifty years, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits, for the purpose of furnishing and supplying the said town or village of Pocatello, and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and,

WHEREAS, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said condition precedent, and obtained vested rights under said grant; and

WHEREAS, the City of Pocatello is a city of the second class and is the legal municipal successor of the said town or village of Pocatello; and

WHEREAS, a commission duly appointed and constituted did on or about the first day of September, 1896, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, then owner and holder of said privileges and franchises, for both public and private uses, which said rates were confirmed and continued by the provisions of Ordinance No. 56, approved June 8th, A. D. 1898; and

WHEREAS, the rates and charges so fixed and continued are now deemed and considered to be fair, equitable, reasonable and just, and will continue to be fair, equitable, reasonable and just, in the near future; and

WHEREAS, the said James A. Murray has succeeded to and is now the owner and holder of all property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including said water system complete, and all rights, privileges and franchises appurtenant thereto, or used therewith; and

WHEREAS, the present supply of water furnished by said water system is deemed inadequate for the present and future need of the said city, and said James A. Murray agrees to bring in the waters of Mink Creek and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles

of pipe at a large additional expenditure of money; and

WHEREAS, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and

WHEREAS, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the City of Pocatello, to extend and give the assurance asked for;

NOW, THEREFORE, be it ordained by the Mayor and Council of the City of Pocatello:

Section 1. That the privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello Town or Village Ordinance No. 46, passed and approved January 4th, 1892, are hereby ratified, continued and confirmed unto James A. Murray, and to his successors and assigns, according to the terms of said original grant, he, the said James A. Murray, being the legal successor of the said F. D. Toms, John J. Cusick, and James A. Murray, therein named.

Section 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company, to the City of Pocatello, and the inhabitants thereof heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the first day of September, 1896, and now in full force and effect within the said City of Pocatello, is hereby declared to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said James A. Murray, for both public and private uses, except as hereinafter stated, to-wit:

[Here follows detailed schedule of water rates.]

Section 3. The foregoing rates and charges are hereby adopted by the City of Pocatello, by and for itself, and as trustees for the use and benefit of all private consumers of water within the corporate limits of said city for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system shall exceed five per cent above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of Sec-

tion Two of this Ordinance, may be readjusted so as to yield not less than five per cent above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section four.

Section 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section three, and if the City of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained and determined in the following manner, to-wit:

A committee of four experienced and disinterested hydraulic engineers who must be members of the American Society of Civil Engineers, shall be selected, two by the City of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth, and if they cannot agree upon a fifth, they shall request the President of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of the said water system for the purpose of



readjusting said rates and such decision shall be final.

Section 5. The city of Pocatello shall not hereafter grant to any individual, corporation, or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, confirmed and continued in said James A. Murray; nor shall the City of Pocatello build, acquire, own or operate a water system of its own, until it has in good faith offered to purchase the water system of the said James A. Murray or his successors or assigns, at a price to be ascertained as follows: If the owners of said water system and the City of Pocatello cannot agree upon the price then a committee of experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers shall be selected in the manner set forth in section four of this ordinance, who shall fix the value of said water system for the purposes of such sale, and the decision of a majority of such committee shall be final.

At intervals of five years from the approval of this ordinance and during a period of ninety days, immediately following the completion of each five year interval, the city may purchase the water system of the said James A. Murray, or his successors or assigns, under the conditions specified in this section, but at no other time except by

mutual consent of the city and the owner of said water system.

In fixing the value of the said water system, whether for the purpose of selling or of readjusting rates, the water system of the said James A. Murray, or his successors or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances, machines, tools, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand and belonging to the said James A. Murray, in his capacity of furnishing water for any and all purposes to himself and to his customers at Pocatello, Idaho, saving and excepting account books and records; and each article of property aforesaid shall be separately considered and evaluated by said committee; and in the event of the City of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the said city shall receive and pay for the whole plant as aforesaid, the said James A. Murray stepping out, and leaving all said property undisturbed and ready for the city to step in.

Section 6. Within ninety days from and after the passage and approval of this

ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances. Such compliance with this ordinance shall entitle the said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.

Section 7. That in consideration of the improvements named in this ordinance, the city of Pocatello hereby agrees to rent, receive and pay for, not less than forty-five (45) fire hydrants, at the schedule rate named in section 2 hereof; and within ninety days after the passage and approval of this ordinance to designate points on the water mains at which the extra hydrants shall be placed as soon as may be, the hydrants to be subject to rental from and after the date of their being placed in position.

Section 8. If at any time the said James A. Murray, or his successors or assigns, fail to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source, directly or in-

directly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed this 6th day of June, 1901.

T. O. SMITH,

City Clerk.

Approved this June 6th, 1901.

THEO. TURNER, Mayor."

After the passage of said ordinance, and on the 16th day of March, A. D. 1907, the legislature of the state passed an act which is now section 2839 of the Revised Code of Idaho, which provides as follows:

"Sec. 2839. All persons, companies or corporations, supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water, may, from time to time establish, and at

such rates as established in the manner hereinafter specified; and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified.

The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the town or city authorities, or when there are no town or city authorities, then by the board of county commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; said town or city authorities must, within ten days after the appointment of the two commissioners so selected, give notice in writing to said person, company, or corporation supplying water, of the appointment of such commissioners, and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or city, must be selected by the person, company, or corporation supplying water, and in case a majority of the four commissioners so selected cannot agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or city, and if they cannot agree upon a fifth commissioner, then the probate judge of the county, must, within ten days after notice to him by said commissioners, that they are unable to agree upon a fifth commissioner, select a fifth commissioner

qualified as aforesaid. The decision of a majority of the commissioners so selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days from the date such board of water commissioners is complete: Provided, That any person, company, or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, That nothing in this section contained shall relieve said town or city authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a franchise to any person, company, or corporation, to supply water as aforesaid: Provided, further, That said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one-half of said sum to be paid by the town or city, and one-half by such person, company or corporation supplying water: Provided, further, That said commissioners shall be empowered to incur any other expense that may be necessary to

aid them in establishing such water rates, and one-half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

This section is found on pages 2, 3 and 4 of the brief in support of the pending motion. On January 19, 1909, the City of Pocatello, as plaintiff, brought its bill of complaint against James A. Murray, doing business as The Pocatello Water Company, as defendant, in the then Circuit Court of the United States for the District of Idaho (Exhibit B, printed pp. 30-37, inclusive, of the record), which bill, omitting jurisdictional allegations, alleged in substance as follows:

That the said ordinance was accepted by the said Murray; that the plaintiff is entitled to have a new schedule of water rates and charges fixed; that the rates and charges fixed in ordinance 86 have ceased to be reasonable and proper, because of increased demand for water, and the inferior and unsatisfactory service; that the prevailing rates are excessive, extortionate and oppressive; that the legislature has provided for the determination of the rates by means of commissioners, as provided in said section 2839 of the Revised Codes of Idaho; that, pursuant to the said section of the revised codes, the said city has appointed two commissioners, and James A. Murray has refused to appoint two commissioners, though

requested so to do; that the said James A. Murray has been since the 28th day of July, 1908, and now is, absent from the State of Idaho, and the plaintiff is unable to procure personal service upon the said Murray; that the said Murray remains without the state for the express purpose of defeating the appointment of commissioners under the laws of Idaho, and to defeat the fixing both of new rates or charges for water, and for the purpose of preventing the service of subpoena in this action, and for the purpose of hindering, delaying and preventing the plaintiff from recovering its demand; that the plaintiff has no plain, adequate or speedy remedy, and invokes the jurisdiction of a court of equity; that said James A. Murray fraudulently, wrongfully and maliciously failed, etc., to join with the plaintiff in fixing and providing new rates and charges for furnishing water to the city and its inhabitants, and has forfeited to and owes the city the sum of fourteen thousand three hundred dollars as a penalty under the provisions of said section 2839, no part of which has been paid; that the said waterworks plant and water system of said James A. Murray is mortgaged in the sum of four hundred thousand dollars, which exceeds the present and probable future value of said waterworks and plant; that the monthly cash revenue of said waterworks plant is now about five thousand dollars; that the same



is collected and disposed of by one George Winter, sole manager, director, agent and superintendent, which sum is, by the direction of the said Murray, remitted by said Winter out of the State of Idaho monthly, and into the States of Montana and California; that the said sums are so withdrawn from the State of Idaho with the fraudulent design and intent to withdraw the same from the jurisdiction of the courts of the State of Idaho and of this court; that in the event of recovery by the plaintiff of its demand, or any part thereof, the property of the defendant remaining within the State of Idaho will be wholly insufficient to meet and pay the same, or any part thereof, and there will be no moneys or revenue of the said waterworks plant and water system, belonging to the defendant, which may or can be reached by legal or equitable process out of this or any other court, and applied to the liquidation of any judgment which the plaintiff may recover, and that in order to protect the rights of the plaintiff it is necessary that a receiver be appointed by the court, to collect and safely keep the monthly cash revenues of the said waterworks plant and water system, and to hold the same subject to the order of the court, and to expend and apply the same, or such part thereof as may be necessary, in such manner and for such purposes as this court may hereafter order and adjudge in the premises; that in order that

the plaintiff may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by said James A. Murray under his franchise, to the plaintiff and its inhabitants, for the period of three years now next ensuing, or any part of such relief, it is necessary that this court interpose and intervene by an exercise of its equity powers, and proceed to make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to this court shall seem meet and proper. The prayer for relief was, first, for subpoena; second, that the court make, fix and promulgate reasonable charges for water to be furnished by the defendant under his franchise for the period of three years from the date of the court's order; that the defendant be restrained from making, fixing or promulgating any other rates; third, that the court appoint a receiver to keep all monthly or cash revenues, and apply the same under the order of the court; fourth, for judgment in the sum of fourteen thousand three hundred dollars for violations of said statute in refusing to appoint commissioners; fifth, for general relief.

To this complaint, the defendant, James A. Murray, filed a demurrer (to be found on pp. 37, 38 and

39 of the printed record), setting forth the following grounds of demurrer:

First, that the court is without jurisdiction of the subject-matter of the bill of complaint, the same not presenting a cause for equitable cognizance; second, the complainant in and of its said bill has not made or stated such a cause as entitles it in a court of equity to any relief against the defendant as to any matters set forth in the said bill; third, that the bill is multifarious because inconsistent causes of action are stated therein; fourth, that the bill is multifarious because of misjoinder of causes of action; to-wit, (a) a cause of action in favor of the plaintiff and against the defendant to recover a money judgment for a penalty under the Idaho statute; (b) a cause of action in equity to fix reasonable rates and charges; (c) a cause of action in equity for the appointment of a receiver.

Thereafter said cause was heard upon said demurrer, and on the 3rd day of May, 1909, the said Circuit Court of the United States announced its intention of sustaining the demurrer, and ordered the bill dismissed, which was accordingly done (see page 40 of the record). The opinion of DeHaven, district Judge, is set forth at page 41 of the printed record in this case. The court says, *inter alia*:

“ \* \* \* in my opinion, the demurrer must be sustained upon the broad ground that the bill does not state a cause of action

entitling the plaintiff to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The City of Pocatello, under its general power to provide the city with water, was authorized to contract with any person, or corporation, to furnish water for it and its inhabitants and Ordinance 86, under which the defendant is furnishing water to the complainant and its citizens constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and for that reason are not affected by a subsequent statute of Idaho of March 16th, 1897, amending section 2711 of the Revised Statutes of 1897 of the State of Idaho, referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because defendant desired 'to be protected against unreasonable and arbitrary charges for water and water service,' before undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation on the part of the City

of Pocatello to pursue the mode pointed out in those sections in readjusting or changing the water rates named in the ordinance, an obligation which, under Article I, section 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections provide for adjusting and fixing the charges to be allowed the defendant for water furnished by him under the ordinance cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant."

In addition to the foregoing ground for sustaining the demurrer, the court held that

"Even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the City of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges which the defendant shall have the right to collect during the next three years under his franchise."

That court further held that the fact that defendant had refused to concur in the naming of commissioners, under the statute, did not give to the court jurisdiction to fix the rates.

Thereafter, and on the 6th day of July, 1911, the mayor and City Council of Pocatello passed the following resolution:

"Be it resolved by the Mayor and City Council of the City, of Pocatello, Bannock County, Idaho, that the schedule of charges for water and water service both public and private, supplied and furnished to the City of Pocatello and its inhabitants, by James A. Murray, doing business under the name and style of the Pocatello Water Company, as now in force, are not fair, equitable or reasonable to the City of Pocatello and its inhabitants, and that it is the right and duty of this body to have a commission appointed pursuant to the provisions of section 2839, Idaho Revised Codes, to fix and determine the rates to be charged for water and water service to the City of Pocatello, and its inhabitants by said James A. Murray:

Therefore, be it resolved that J. H. Townsend, and W. P. Havenor, tax payers of the City of Pocatello, Bannock County, Idaho, as Commissioners to act in conjunction with other commissioners to be appointed pursuant to the provisions of section 2839, Idaho Revised Codes, to fix and determine the rates to be charged for water and water service, both public and private, in the City of Pocatello, Bannock County, Idaho, as therein provided.

Be it further resolved that James A. Murray be given the notice required by said

section 2839 of the appointment of said two commissioners as provided herein, and that demand be made upon him that he at once and within thirty days after said demand appoint a like number of commissioners to act in conjunction with those hereby appointed, and pursuant to the provisions of said section 2839, Idaho Revised Codes.

Dated at Pocatello, Idaho, this 6th day of July, 1911.

J. M. BISTLINE,  
Mayor.

Attest:

FINN H. BERG,  
Clerk."

(P. 12 of the printed record.)

And on the same day issued to this plaintiff in error the following notice:

**"NOTICE.**

Pocatello, Idaho, July 6, 1911.

To James A. Murray, Pocatello Water Co.:

You are hereby notified that the City of Pocatello this day has appointed two commissioners to fix the rates to be charged for water in the City of Pocatello, Bannock County, Idaho, pursuant to the provisions of section 2839, Revised Codes of Idaho, the two commissioners appointed being J. H. Townsend and W. P. Havenor, and you are hereby called upon to appoint two commissioners to act for yourself and the Pocatello Water Company as provided in section 2839,

Idaho Revised Codes. A copy of the resolution appointing said commissioners is hereto attached and made a part hereof.

J. M. BISTLINE,

Mayor.

Attest:

FINN H. BERG,

Clerk."

(P. 12 of the printed record.)

Thereafter, and on, to-wit, the 23rd day of September, 1911, the City of Pocatello filed its affidavit for writ of mandate in the Supreme Court of the State of Idaho (to be found on pp. 4-14, inclusive, of the printed record), reciting facts in substance as follows: That the defendant, James A. Murray, is doing business as The Pocatello Water Company, and is owning and operating a water plant to supply the City of Pocatello, and is assuming to act in accordance with the provisions of the said Ordinance 86; that the City Council did, on the 6th day of July, 1911, pass a resolution declaring the current rates charged by the defendant for such service to be unfair, inequitable and unreasonable, and directing the appointment of a commission pursuant to the provisions of section 2839 of the Revised Codes of Idaho of 1909, and appointing two taxpayers as commissioners to act on behalf of the city in conjunction with the other commissioners to be appointed as provided for in said ordinance; that the notice of such action of the City Council was served upon the defendant, James A. Murray, on the 15th day of July, 1911, and that he was asked to appoint two commissioners to act for



himself under the provisions of the said section, and that he has refused to appoint such commissioners, basing his refusal upon the provisions of said Ordinance 86. The prayer of the said affidavit for writ of mandate was that a writ of mandate issue forthwith out of the court commanding the defendant to appoint commissioners to act with the commissioners appointed by the plaintiff, as provided by section 2839 of the Revised Codes of the State of Idaho of 1909, to determine the rates to be charged for water to the City of Pocatello and its inhabitants, and for such other and further order as to the court might seem proper.

In response to said petition, the court issued an alternative writ of mandate, directed to said James A. Murray, to immediately appoint two commissioners to act with the commissioners appointed by the city under the provisions of section 2839, to fix and determine the rates to be charged for said water service, or show cause why the same was not done.

Thereupon the defendant, Murray, filed a demurrer to the said affidavit, and a motion to quash the same, and a detailed answer thereto, which said answer set forth all of the proceedings which have been hereinabove recited.

The city filed a demurrer to the defendant's answer, and thereafter, upon hearing, the said Supreme Court of the State of Idaho directed its peremptory writ of mandate to issue, and on January 18, 1912, filed its written opinion (to be found at pp. 53-71, inclusive, of the printed record). In said opinion it was held: First—

"The judgment and order of the Circuit Court of the United States in dismissing the bill in *City of Pocatello v. Murray* has no bearing on the present action and does not estop the city from maintaining this action."

(The opinion of the Circuit Court in the case of *City of Pocatello vs. Murray* is reported in 173 Fed., 382.)

Second, that the obligations of Ordinance 86, and particularly sections 3 and 4 thereof, are not impaired by the provisions of section 2839 of the Revised Codes of Idaho, and the ordinance of July 6, 1911, and, in so holding, it decided, *inter alia*, that the method for valuing the plant prescribed by section 5 of Ordinance 86 is superseded by the provisions of section 2839 of the Revised Codes of Idaho; that the provision in section 3 of Ordinance 86, that 5 per cent net income on the valuation to be determined by the commission provided for in said ordinance, is not binding upon the municipality, and must yield to rates fixed by the commission to be appointed under said statute and ordinance of July 6, 1911.

Thereafter the court issued its peremptory writ of mandate, commanding the defendant to immediately appoint two commissioners to act, etc. To this peremptory writ the plaintiff in error sued out a writ of error to this, the Supreme Court of the United States. Thereupon the City of Pocatello filed its motion in this court to affirm the judgment of the Supreme Court of the State of Idaho in this cause, upon which the court ordered the cause to be placed upon the summary docket for hearing.

## ARGUMENT.

The plaintiff invokes the jurisdiction of this court on the several grounds set forth in the assignments of error. He directs the court's attention especially to two grounds whereupon he predicates his claim that the rights and immunities guaranteed to him as a citizen of the United States by the Constitution and laws of the United States have been denied by the legislature of the State of Idaho, by the city council and city of Pocatello, and the Supreme Court of Idaho, to-wit:

First—That the Supreme Court of the State of Idaho did not give full faith and credit to the final judgment of the Circuit Court of the United States for the District of Idaho, rendered in the case of *City of Pocatello, plaintiff, vs. James A. Murray, etc.*, reported in 173 Fed., at page 382, in violation of Article IV, section 1, of the Constitution of the United States, and in violation of section 709 of the Revised Statutes of the United States; and denied the right, privilege and immunity claimed by this plaintiff in error under the laws and Constitution of the United States.

Second—That the obligation of the contract evidenced by said Ordinance No. 86 has been impaired in violation of the provisions of Article I, section 10, of the Federal Constitution, and that the plaintiff in error has been deprived of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

*RES ADJUDICATA.*

The plaintiff in error, as a defense to the petition for mandamus, set up a plea of *res adjudicata*, based upon certain proceedings theretofore had in the Circuit Court of the United States for the District of Idaho, which culminated in a judgment favorable to the plaintiff in error, who was the defendant in that suit. All of the proceedings in that cause appear at printed pages 30-45 in the record herein. The Supreme Court of the State of Idaho refused to sustain the plea. By his eleventh assignment of error the plaintiff in error challenges the ruling of the Supreme Court of Idaho upon that plea.

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*1. The Denial of Plea Presents a Federal Question.*

The judgment of the Circuit Court of the United States for the District of Idaho pleaded in bar was a judgment on the equity side of the court. The jurisdiction of the court was based upon diversity of citizenship, and the presence of a federal question involved in the construction of Article I, section 10, of the Federal Constitution.

The refusal to sustain the plea presents a federal question under both the "full faith and credit clause of the constitution" and under section 709 of the Revised Statutes, referring to the denial of a right, privilege or immunity claimed under the authority of the United States.

Phoenix Ins. Co. vs. Tennessee, 161 U. S.,  
at 185.

Dowell vs. Applegate, 152 U. S., 327.

Deposit Bank vs. Frankfort, 191 U. S.,  
499.

In the case of Deposit Bank vs. Frankfort, *supra*,  
the court said (p. 515) :

"It is true that for some purposes and within certain limits, it is only required that the judgments of the courts of the United States shall be given the same force and effect as are given the judgments of courts of the states wherein rendered ; but it is equally true that whether a federal judgment had been given due force and effect in the state court is a federal question, reviewable by this court, which will determine for itself whether such judgment has been given due weight, or otherwise."

And again (p. 517) :

"But it is equally well settled that a right claimed under the federal constitution, finally adjudicated in the federal courts, can never be taken away, or impaired, by state decisions. The same reasoning which permits to the states the right of final adjudication upon purely state questions, requires no less respect for the final decisions of the federal courts on questions of national authority and jurisdiction."

*2. The Judgment on Demurrer Is Conclusive of Matters Actually Decided.*

The judgment pleaded was rendered upon a demurrer to the bill of complaint, and therefore is conclusive of that which was in fact decided.

*Wiggins Ferry Co. vs. Ohio & Mississippi R. R. Co.*, 142 U. S., 396, at 410.

In the last-cited case the court uses the following language :

"Where the judgment in the former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings, or decided, and does not operate as a bar to a second suit for other breaches of the same covenants; although, if the judgment be upon pleadings and proofs, the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue."

A judgment of dismissal on demurrer, with no limitations placed thereon, is a judgment on the merits.

*Durant vs. Essex Co.*, 7 Wall., 107.

*Forsythe vs. City of Hammond*, 166 U. S., 506.

*Aurora City vs. West*, 7 Wall., 82.

A dismissal of the bill without reservation is presumed to be on the merits.

*Baker vs. Cummings*, 181 U. S., at 125.

In the latter case it was said:

"The proceedings, however, which were those directed to be taken, were simply to reverse the judgment of the lower court and to dismiss the bill. It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be on the merits unless it be otherwise stated in the decree of dismissal."

In the event a general decree of dismissal is entered without a consideration of the merits, the defeated party may ask to have the order of dismissal entered "without prejudice," and if the trial court refuses to so qualify the dismissal, the decree of dismissal is appealable, and will be corrected on appeal.

Swan Land & C. Co. vs. Frank, 148 U. S.,  
at 612.

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### 3. *Resort May Be Made to Opinion to Determine What Was Actually Decided—Consideration of Record and Effect of Decision.*

We may properly resort to an inspection of the decision filed by Judge DeHaven in the proceedings relied upon by us to establish the plea of *res judicata*, and such opinion may be considered in connection with the rest of the record to determine what was in fact decided in that proceeding.

Dowell vs. Applegate, 152 U. S., 327.

Baker vs. Cummings, 181 U. S., 117.

Nat'l Foundry & Pipe Works vs. Oconto  
Water Supply Co., 183 U. S., 216.

Last Chance Mining Co. vs. Tyler Mining  
Co., 157 U. S., 683.

In the case of National Foundry Co. vs. Oconto  
Water Supply Co., *supra*, the court said (p. 234) :

"It is elementary that if from the decree  
in the cause there be uncertainty as to what  
was actually decided, resort may be had to  
the pleadings and to the opinion of the court  
in order to throw light upon the subject."

The opinion of Judge DeHaven is reported in  
173 Fed., at 382. The record in that case shows that  
the City of Pocatello as complainant brought its bill  
of complaint against James A. Murray, doing busi-  
ness as The Pocatello Water Company, defendant, in  
the then Circuit Court of the United States for the  
District of Idaho. (Exhibit B, pp. 30-37, inclusive,  
of the printed record.) The bill of complaint alleged  
in substance as follows :

That Ordinance No. 86 was accepted by  
the said Murray ; that the plaintiff is entitled  
to have a new schedule of water rates and  
charges fixed ; that the rates and charges  
fixed in Ordinance 86 have ceased to be rea-  
sonable and proper, because of increased de-  
mand for water, and the inferior and unsat-  
isfactory service ; that the prevailing rates  
are excessive, extortionate and oppressive ;  
that the legislature has provided for the de-



termination of the rates by means of commissioners, as provided in said section 2839 of the Revised Codes of Idaho; that, pursuant to the said section of the Revised Codes, the said city has appointed two commissioners, and James A. Murray has refused to appoint two commissioners, though requested so to do; that the said James A. Murray has been since the 28th day of July, 1908, and now is, absent from the State of Idaho, and the plaintiff is unable to procure personal service on the said Murray; that the said Murray remains without the state for the express purpose of defeating the appointment of commissioners under the laws of Idaho, and to defeat the fixing both of new rates or charges for water, and for the purpose of preventing the service of subpoena in this action, and for the purpose of hindering, delaying and preventing the plaintiff from recovering its demand; that the plaintiff has no plain, adequate or speedy remedy, and invokes the jurisdiction of a court of equity; that said James A. Murray fraudulently, wrongfully and maliciously failed, etc., to join with the plaintiff in fixing and providing new rates and charges for furnishing water to the city and its inhabitants, and has forfeited to and owes the city the sum of fourteen thousand three hundred dollars as a penalty under the provisions of said section 2839, no part of which has been paid; that the said waterworks plant and water

system of said James A. Murray is mortgaged in the sum of four hundred thousand dollars, which exceeds the present and probable future value of said waterworks and plant; that the monthly cash revenue of said waterworks plant is now about five thousand dollars; that the same is collected and disposed of by one George Winter, sole manager, director, agent and superintendent, which sum is, by the direction of said Murray, remitted by the said Winter out of the State of Idaho monthly, and into the States of Montana and California; that the said sums are so withdrawn from the State of Idaho with the fraudulent design and intent to withdraw the same from the jurisdiction of the courts of the State of Idaho and of this court; that in the event of recovery by the plaintiff of its demand, or any part thereof, the property of the defendant remaining within the State of Idaho will be wholly insufficient to meet and pay the same, or any part thereof, and there will be no moneys or revenue of the said waterworks plant and water system, belonging to the defendant, which may or can be reached by legal or equitable process out of this or any other court, and applied to the liquidation of any judgment which the plaintiff may recover, and that in order to protect the rights of the plaintiff it is necessary that a receiver be appointed by the court, to collect and safely keep the monthly cash revenues of the said

waterworks plant and water system, and to hold the same subject to the order of the court, and to expend and apply the same, or such part thereof as may be necessary, in such manner and for such purposes as this court may hereafter order and adjudge in the premises; that in order that the plaintiff may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by said James A. Murray under his franchise, to the plaintiff and its inhabitants, for the period of three years now next ensuing, or any part of such relief, it is necessary that this court interpose and intervene by an exercise of its equity powers, and proceed to make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to this court shall seem meet and proper. The prayer for relief was, first, for subpoena; second, that the court make, fix and promulgate reasonable charges for water to be furnished by the defendant under his franchise for the period of three years from the date of the court's order; that the defendant be restrained from making, fixing or promulgating any other rates; third, that the court appoint a receiver to keep all monthly or cash revenues, and apply the same under the order of the court; fourth, for judgment in

the sum of fourteen thousand three hundred dollars for violations of said statute in refusing to appoint commissioners; fifth, for general relief.

To this complaint, the defendant, James A. Murray, filed a demurrer (to be found on pp. 37, 38 and 39 of the printed record), setting forth the following grounds of demurrer:

First, that the court is without jurisdiction of the subject-matter of the bill of complaint, the same not presenting a cause for equitable cognizance; second, the complainant in and of its said bill has not made or stated such a cause as entitles it in a court of equity to any relief against the defendant as to any matters set forth in the said bill; third, that the bill is multifarious because inconsistent causes of action are stated therein; fourth, that the bill is multifarious because of misjoinder of causes of action; to-wit, (a) a cause of action in favor of the plaintiff and against the defendant to recover a money judgment for a penalty under the Idaho statute; (b) a cause of action in equity to fix reasonable rates and charges; (c) a cause of action in equity for the appointment of a receiver.

Thereafter said cause was heard upon said demurrer, and on the 3rd day of May, 1909, the said Circuit Court of the United States announced its intention of sustaining the demurrer, and ordered the

bill dismissed, which was accordingly done (see p. 40 of the record). The opinion of DeHaven, district judge, is set forth at page 41 of the printed record in this case. The court says, *inter alia*:

" \* \* \* in my opinion, the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the plaintiff to equitable relief prayed for. The reasons for this conclusion will be briefly stated. The City of Pocatello, under its general power to provide the city with water, was authorized to contract with any person, or corporation, to furnish water for it and its inhabitants, and Ordinance 86, under which the defendant is furnishing water to the complainant and its citizens, constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and for that reason are not affected by a subsequent statute of Idaho of March 16th, 1897, amending section 2711 of the Revised Statutes of 1897 of the State of Idaho, referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because defendant desired 'to be protected against unreasonable and arbitrary charges for water and water service,' before

undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation on the part of the city of Pocatello to pursue the mode pointed out in those sections in readjusting or changing the water rates named in the ordinance, an obligation which, under Article I, section 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections provide for adjusting and fixing the charges to be allowed the defendant for water furnished by him under the ordinance cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant."

In addition to the foregoing ground for sustaining the demurrer, the court held that—

"Even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the City of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges which the defendant shall have the

right to collect during the next three years under his franchise."

That court further held that the fact that defendant had refused to concur in the naming of commissioners, under the statute, did not give to the court jurisdiction to fix the rates.

There can be no dispute about the theory of the complaint in that suit. The city set up Ordinance 86 and pleaded section 2839 of the Idaho Revised Codes. It set up the efforts of the city to compel the defendant to join in proceedings for the fixing of rates, under the provisions of section 2839. It alleged that a large penalty had accrued against the defendant and in favor of the city because of his failure to observe the provisions of section 2839. It alleged fraudulent actions on the part of the defendant for the purpose of depriving the city of any security for such penalties. It charged the defendant with concealing and carrying away funds. It asked for judgment. It asked for the appointment of a receiver, and it asked the court to fix the rates. Certainly the plaintiff conceived that its demands were a matter of equitable cognizance, by its own pleading. It asked the court to consider Ordinance 86, and to declare that, notwithstanding Ordinance No. 86, the defendant, Murray, must at the demand of the city participate in the creation of a commission to fix the rates. The city must have conceived that it was entitled to the appointment of a receiver; that somewhere in a court of equity it would find the relief it prayed for. It is conceivable that the court might have said that no such relief would be granted, what-

ever might be the effect of section 2839 on Ordinance 86. But the court did not choose to deny the relief prayed for without a consideration of the constitutional question involved. The court chose to consider that question, and it held that—

“Sections 3 and 4 of that ordinance are a substantial part of that contract, and are for that reason, not affected by the subsequent statute of Idaho of March 16th, 1907, amending section 2711 of the Revised Statutes of 1887 of the State of Idaho, referred to in the bill of complaint, and upon which the complainant relies. \* \* \* (a) argument is not necessary to show that they are an essential part of the contract, and create an obligation upon the part of the City of Pocatello to pursue the mode pointed out in those sections in re-adjusting, or changing the water rates named in the ordinance,—an obligation which, under Article I, section 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state.”

Therefore, the court must have concluded that no penalty had accrued; that no fraud was being practiced on the city; that no ground existed for the appointment of a receiver. Clearly, the court decided the constitutional question involved. That question was distinctly put in issue by the complainants, and was determined as one of the material questions in the case. It cannot be said that, because the court strengthened its conclusion by further showing that



in no event could the further relief prayed for be granted, or by further strengthening its opinion by additional reasons why any of the relief prayed for should not be granted, therefore it did not decide the constitutional question involved.

Ontario Land Co. vs. Wilfong, 223 U. S.,  
543.

In the last-cited case we quote from the syllabus :

"Where a decision is based on two grounds, either of which is sufficient to sustain it, neither is *obiter*. Union Pacific R. R. Co. v. Mason City R. R. Co., 222 U. S. 237."

The Supreme Court of Idaho supported its action in failing to sustain the plea of *res adjudicata* on the theory that the United States Circuit Court had no jurisdiction of the bill, and therefore had no jurisdiction to decide any other question in the case. In this connection, the Supreme Court of Idaho said :

"While the court there took occasion to consider the effect of the statute (sec. 2839) on the ordinance in question, and expressed the view that the statute was inoperative as against that ordinance, still, it is clear to us that the court disposed of the case on the sole ground of jurisdiction. As we understand it, where the case is disposed of on the ground that the court has no jurisdiction to hear and determine the matter, it has no jurisdiction to pass upon any question, except the jurisdictional question."

We submit that the Supreme Court of the State of Idaho misapplied the rule which it adopted. Clearly, the Circuit Court of the United States took jurisdiction of the cause to determine whether the complainant was entitled to the relief prayed for. The court had jurisdiction of the parties and of the subject-matter. It had jurisdiction to decide any question it might think material in reaching its conclusions as to the right of the complainant to equitable relief, and anything so decided became an adjudicated matter, notwithstanding the result of the decision was a dismissal of the bill for lack of grounds for equitable relief.

In *Dowell vs. Applegate*, *supra*, this court said, at page 337:

"If the federal court erred in assuming or retaining jurisdiction of Dowell's suit—a question not necessary to be examined—would it follow that its final decree being unmodified and enforced can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered? \* \* \* These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in enter-

taining jurisdiction, its determination of that matter was conclusive on the parties before it, and could not be questioned by them, or either of them collaterally, or otherwise, than on writ of error, or appeal to this court."

In *Mellin vs. Moline Iron Works*, 131 U. S., 352, at 367, the court said:

"It is, however, contended that the company could not rightfully invoke the aid of a court of equity to remove this lien or encumbrance until it had, by obtaining judgment for its debt, and suing out execution, exhausted its legal remedies. \* \* \* But that was one of the questions necessary to be determined in the suit brought by that company, and any error in deciding it would not authorize even the same court in an original, independent suit, to treat the decree as void. Besides, the removal of alleged liens, or encumbrances, upon property, the closing up of affairs of insolvent corporations, and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction. \* \* \* An adjudication that a particular case is of equitable cognizance cannot be disturbed by an original suit. Such an adjudication is not void even if erroneous."

In *Insley vs. U. S.*, 150 U. S., 512, at 515, the court said:

"Even an objection that an action should have been brought at law, instead of

in equity, may be waived by failure to take advantage of it at the proper time."

It may be that the district judge was in error in thinking it necessary to examine the constitutional question decided by him, but that does not alter the fact that the question *was* decided. In *Deposit Bank vs. Frankfort*, *supra*, this court said:

"It would undermine the principle on which it is based if the court might enquire into and revise the reasons which led the court to make the judgment."

By the decision of the District Court for the District of Idaho, this plaintiff in error received the added security and assurance of the decision of the federal court in a case between the identical parties in a matter involving the identical facts, and principles, which this case involves. It is not necessary to find that the Circuit Court for the District of Idaho had jurisdiction in the cause pending before it to fix the rates as between the parties, in order to find that it had a cause of equitable cognizance wherein it had authority and jurisdiction to decide the questions of law which, in its judgment, were necessary to be decided before it could dispose of the merits of the contention before it.

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4. *The Defendant in Error Cannot Question the Jurisdiction of the Court to Decide the Constitutional Questions and Render Judgment.*

The City of Pocatello cannot be heard to say that that court had not cognizance of the case, or that it

had not equitable jurisdiction; for it was the plaintiff in the case who filed the bill, and invoked the equitable jurisdiction of the court. In the case of *Forsythe vs. Hammond*, 166 U. S., 506, one of the parties had brought an action in the Supreme Court of the State of Indiana, which had for its object the determination of some questions affecting the boundaries of a municipal corporation. The State Supreme Court took jurisdiction and decided adversely to the moving party. Thereafter, the defending party in the proceeding in the State Supreme Court was made a defendant by the same moving party in an action in the Circuit Court of the United States for the District of Indiana, and the defending party therein set up the decision in his favor made in the judicial proceedings had in the Supreme Court of Indiana. The plaintiff in the federal court (being the same party who was plaintiff in the state court) insisted that the decision of the Supreme Court of the state was not *res judicata*, because the matter before it was solely of legislative cognizance, and not judicial in its nature, and therefore beyond the jurisdiction of the Supreme Court of Indiana. To that contention, this court answered (pp. 516, 517 and 518):

"But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision. \* \* \* Were or were not these proceedings valid, and was or was not such a decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question is certainly one of a judicial nature. Now, it is no less a judicial function to con-

sider whether those proceedings and that decree were valid and effective, and determine that they were, and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the City of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does

not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

It would be difficult to find a case more clearly in point, and involving more of the questions involved in the case at bar.

Had the Supreme Court of the State of Idaho given to the decree of the Circuit Court of the United States for the District of Idaho the faith, credit, force and effect to which it was entitled under the laws and Constitution of the United States, it could not have consistently issued its writ of mandate. That writ was issued in disregard of the covenants contained in Ordinance 86 to the effect that no adjust-

ment of rates shall be had until after the valuation has been made in accordance with the covenants in that ordinance. The covenants of that ordinance were upheld by the federal court as against the statute law under which the Supreme Court of Idaho issued its writ of mandate. The two decisions are diametrically opposed. Had the Supreme Court of Idaho given full faith and credit to the judgment of the Circuit Court of the United States, the dismissal of the petition for the writ of mandate would have been imperative.

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#### IMPAIRMENT OF OBLIGATIONS OF CONTRACT CONTAINED IN ORDINANCE NO. 86.

##### *1. The Question Is a Substantial One.*

The district judge, sitting in the Circuit Court of the United States for the District of Idaho, in the case of the City of Pocatello vs. James A. Murray, 173 Fed., 382, filed a written opinion, in which it was solemnly, judicially declared that the obligation of the contract in Ordinance No. 86 was protected by Article I, section 10, of the Federal Constitution against the provisions of section 2839 of the Idaho Revised Codes, and an ordinance by which the city undertook to take advantage of the provisions of said section 2839. On the same question the Honorable, the Supreme Court of the State of Idaho, as solemnly and judicially expressed views diametrically opposite to the views of the Circuit Court of the United States for the District of Idaho. A consideration of this fact should acquit the plaintiff in error of the charge



of bringing to this court a frivolous and unfounded constitutional question, predicated on such a state of facts and law. If the plea of *res judicata* is not sustained by this court, such a condition of affairs is the strongest reason why this court should exercise its jurisdiction and authoritatively conclude the question.

Forsythe vs. Hammond, 166 U. S., 514.

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2. *This Court Will Determine for Itself What Is the Contract between the Parties. Do the Subsequent Legislation and Judicial Construction Impair That Contract?*

The plaintiff in error asks the court to determine the true construction of the contract in Ordinance No. 86; whether it has been impaired by the act of the Legislature of Idaho (Rev. Codes of Idaho, sec. 2839), resolution of the City Council of the City of Pocatello (Resolution of July 16, 1911, p. 12 of the printed record), and the construction of the Supreme Court of the State of Idaho in its decision and judgment in this case.

Cross Lake Club vs. Louisiana, 224 U. S.,  
632, at 639.

J. W. Perry Co. vs. Norfolk, 220 U. S.,  
479.

Columbia W. R. Co. vs. Columbia, 172  
U. S., 475, at 487.

McCullough vs. Virginia, 172 U. S., 102,  
at 109 and 110.

Louisville Gas Co. vs. Citizens Gas Co.,  
115 U. S., 683, at 697.

Douglas vs. Wolsey, 16 How., 360.

In the case of Perry Co. vs. Norfolk, *supra*, at p. 479, it was said:

" \* \* \* for a valid contract of exemption from taxation may be impaired by wrongful construction as well as by an unconstitutional statute attempting a direct repeal. This court, therefore, has power in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

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### 3. *The Contract—Its Purposes and Terms.*

The purpose of the contract contained in Ordinance No. 86 is clearly expressed and positively declared in the preamble (p. 7 of the printed record). We quote that part of the preamble for convenience and emphasis:

"Whereas, the said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable, or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made, and

Whereas, the demand of the said James

A. Murray is considered reasonable and just, and it is deemed for the best interests of the City of Pocatello to extend and give the assurance asked for \* \* \*."

"The reasonable assurances" given are found in sections 3, 4 and 5, which are set out in full in the printed record at pp. 9, 10 and 11, and are quoted in the statement of facts in this brief. By section 3 it is provided in effect that a certain schedule of rates that had theretofore been adopted by a certain commission appointed and acting under a law which was held to have no application to this plaintiff in error, or his property, should be considered reasonable, and should be continued in force and effect for a period of five years; that at the end of the first five-year period, if it should be made to appear that the earnings of the water system of the plaintiff in error exceeded 5 per cent above reasonable expenses upon the value of the said water system as it might then be agreed upon, or as it might be ascertained by appraisal as elsewhere in the ordinance provided, then the rates might be adjusted so as to yield not less than 5 per cent above reasonable expenses on the valuation; but no readjustment shall be made that will yield less than 5 per cent, as so provided. Section 4 provides that if at any time, when the city desires to purchase the property, or readjust rates, the city and the plaintiff in error cannot agree upon the value of the said water system for the purpose of such readjustment, then the value of the water system shall be ascertained and determined by a committee of four disinterested hydraulic engineers, who must be

members of the American Society of Civil Engineers, two to be selected by the City of Pocatello, and two by the plaintiff in error. To this committee shall be submitted the question: "For what sum can the water system of James A. Murray be now duplicated?" In case of disagreement, provision is made for the selection of a fifth member of the committee. The decision of a majority of the committee shall fix the value of the system for the purpose of purchase or readjusting rates, and such decision shall be final. In section 5 it is provided, *inter alia*, that in fixing the value of the water system, whether for the purpose of selling or readjusting rates, the said "water system" shall be held to mean and include

"all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water-rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances, machines, tools, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand, and belonging to the said James A. Murray, in his capacity of furnishing water," etc.

No language can express more clearly than was expressed in Ordinance No. 86 the intention of the city to induce James A. Murray to incur a great outlay for the purpose of increasing the water supply of the city and extending the water service, and to give him full, adequate and effective guaranties and covenants against attempted confiscation of his investment, to insure him a reasonable return on his capi-

tal, and to assure him that the rates enumerated in the ordinance and declared to be reasonable should not thereafter be arbitrarily changed. In effect, the city said to him: "There shall be no change in the rates which you may lawfully charge for your service until these rates become unreasonable. If the city and yourself cannot at any given time agree upon the question whether the rates are reasonable or not, we will provide a method by which the essential facts in our controversy may be fairly determined. If, when these facts are determined, it appears that, tested by a standard which we now adopt, your rates are not unreasonable, then we will not undertake to change them. If, however, it appears that they are unreasonable, we shall then be at liberty to proceed lawfully to establish new rates."

The five-year period during which the rates were fixed has expired. The city agreed that a return on the value of the property equal to "five per cent above expenses" was and is, as a matter of fact, a reasonable return on the investment. It agreed that the fact of the value, if in dispute, should be submitted to a board of appraisers, and that that fact of value should be determined by them. The contract had for its object the preservation of reasonable rates and prevention of arbitrary changes. It was and is in aid of, and not in opposition to, the policy of the state to provide for reasonable rates. It did not attempt to establish a schedule of rates to be maintained regardless of their fairness or reasonableness.

#### *4. How Impaired.*

The contract has been impaired in the following respects:

First—The Supreme Court of Idaho, construing section 2839 of the Revised Codes, and the resolution of the city council of July 6, 1911, has ordered the plaintiff in error to join in proceedings for the establishment of rates, notwithstanding the city has failed to comply with the covenant that the rates shall not be readjusted, except when it is agreed that they have become unreasonable, or when the value shall be determined by appraisers, and it shall then appear that the rates yield in excess of expenses plus 5 per cent on the value so fixed.

Stated in another form, the Supreme Court of Idaho has required the plaintiff in error to unite in the appointment of a commission to fix rates in advance of an inquiry as to whether existing rates produce an income in excess of 5 per cent above reasonable expenses, upon the value of the water system ascertained as provided by said ordinance.

Second—The Supreme Court of Idaho, in its opinion construing Ordinance No. 86, has declared that the covenant in the ordinance wherein the city and the plaintiff in error agree that the income of 5 per cent above expenses on the value of the property, as it may be lawfully fixed, shall be taken to be a reasonable return on the investment of the plaintiff in error, is invalid and unenforceable.

Third—Because the Supreme Court of the State of Idaho has declared that the covenants between the parties to the effect that the value of the property of plaintiff in error shall be determined by a board of

appraisers, whose determination shall be final for rate-fixing purposes, is invalid and unenforceable.

Fourth—Because the Supreme Court of Idaho has declared that the covenants between the parties to the effect that in estimating the value of the property of plaintiff in error the said appraisers shall consider the value of the “rights of way, natural and acquired advantages, and franchises” owned by the plaintiff in error and employed by him as a part of his said system, is invalid and unenforceable.

It is conceded by the Supreme Court of Idaho that but for the provisions of section 2839, and the action of the city thereunder, all of the covenants in Ordinance No. 86 would be valid and enforceable; and it holds that, because of section 2839 and the action of the city thereunder, each and every of the covenants in question here, and relied upon by the plaintiff in error, has been lawfully abrogated; that each and every of the said covenants conflicts with the exercise by the state through its governmental agencies, of the power to establish “reasonable maximum” rates; that the state may, by the exercise of that power, strike down the covenants between the parties and subordinate them to the provisions of section 2839.

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### 5. *Power to Make the Contract.*

#### (a) *The state constitutional provisions involved.*

The Supreme Court of Idaho, in its opinion in this case, considered that two provisions of the State Constitution were involved in the determination of the question whether the city had the power to make

the contract relied upon by the plaintiff in error. These provisions are respectively sections 2 and 6 of Article XV of the Constitution of the State of Idaho.

Section 2 is as follows:

"The right to collect rates or compensation for the use of water supplied to any city, county, or town, or water district, or the inhabitants thereof is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Referring thereto, the Supreme Court of Idaho said that the plaintiff in error

"was immediately chargeable with notice of the terms and conditions of the constitution to the effect that the business in which he was engaging, and the service which he was undertaking to render would be forever 'subject to the regulation and control of the state in the manner prescribed by law'—not the manner already prescribed by law, but in the manner that might from time to time be prescribed by the law making power of the state,—a continuing and ever-existing power. His undertaking and engagement was further impressed with the terms of sec. 2, art. 15, *supra*, to the effect that his right to collect rates, or compensation, for such a service 'is a franchise and cannot be exercised except by authority of, and in the manner prescribed by law'—not the manner already prescribed by law, but in such manner as might from time to time be prescribed



by the supreme law making power of the state (the legislature), a continuing and ever present power, which might at any time be called into exercise."

We submit that section 2 of Article XV of the Constitution of Idaho is not susceptible of such construction. In the absence of such a constitutional provision, the right to supply a city with water, and collect tolls therefor, would be subject to regulation, and could only be exercised in the manner prescribed by law. It is doubtful if such a constitutional provision would have been adopted at all if the only subject covered by it were the supplying of water to cities, and the collection of tolls therefor. But, under the law of the State of Idaho, the waters of the natural streams belong to the state, and the right to use the same is granted to the people. There are many uses of the same outside of municipal uses of the character involved in this suit, and the obvious purpose of section 2 of Article XV is to make certain that the right to charge for each and every use shall be subject to regulation, thereby putting other uses on the same basis as municipal uses. If, as we contend, the city was authorized to enter into the contract in question, it is because the legislature of the state conferred that power upon the municipality by creating it and delegating to it certain powers, and our right to charge for the use of the water is derived from legislative action, and is "as prescribed by law." The fact that the legislature has power to prescribe how and when the municipality may give a franchise and make a contract does not furnish justification for the

alteration, or abrogation, of such a contract by the further exercise of that power. Otherwise there would be no such thing as impairment of a municipal contract by subsequent legislation.

In *City of Freeport vs. Freeport etc. Co.*, 180 U. S., at 607, in the dissenting opinion, the minority called attention to the rule that, in the absence of an express restriction or limitation in the Constitution of the state, restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period, and to agree upon rates,

"The legislature of the state may contract by statute, or may empower a municipality to contract, for water for public use for a stated period, and fix the rates to be paid during such term for the same, and that such contract, if made, is protected from impairment by the Constitution of the United States. \* \* \*"

*New Orleans Water Co. vs. Rivers*,  
115 U. S., 674.

*Los Angeles vs. Los Angeles etc.*, 177  
U. S., 558.

*Vicksburg vs. Vicksburg etc.*, 206  
U. S., 508.

*Freeport vs. Freeport Water Co.*, 180  
U. S., at 608.

The case of *Tampa Water Works vs. Tampa*, 199 U. S., 241, referred to by the Supreme Court of Idaho in its opinion, illustrates the point. In that case this court found in the constitutional provision something

more than a mere investing of power in the legislature, and construed the words "full power" to mean a power which could not be cut down, and as equivalent to the reservation of the right to change and alter contracts made under the authority of that power.

This section (sec. 2, Art. XV) of the Idaho Constitution does not *invest* the legislature with any power. It merely defines certain rights to be franchises, and declares that no one shall exercise such rights except in the manner provided by law. In short, it directs that the law shall provide the terms on which certain franchises may be acquired and exercised.

There is no language used in section 2, Article XV, of the Idaho Constitution, which raises an implication that the legislature must at all times reserve the right to alter, amend or abrogate any franchise that may be acquired pursuant to law.

Section 6 of Article XV is as follows:

"The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for water so rented or distributed for any useful or beneficial purpose."

In the absence of such a constitutional provision, the legislature would have had inherent power to establish rates, and could have delegated that power to municipalities, or other governmental agencies. The Supreme Court of Idaho, in *Wilson vs. Perrault*, 54 Pac., 617; 6 Idaho, 178, construed this section of the Idaho Constitution, and held that under its provisions the legislature of the State of Idaho is *pro-*

*hibited* from fixing "reasonable maximum rates to be charged for water under sale or rental." Under that decision, the power of the legislature of the State of Idaho is confined to the passing of laws authorizing some other agency or agencies to perform that service for the state. If, as we contend, the legislature created the municipality and invested the City of Pocatello with power to enter into the contract in question, then, to the extent to which the city was so authorized, it could provide "the manner in which reasonable maximum rates may be established;" and in that respect the city was at that time the ultimate legislative authority, and the legislature had no power or authority to change the rates so established by the city. It is true that the legislature had the power to take away from the city the power to deal with rates, and confer it upon some other body. That was done. But it does not follow that the contracts therefore made by the city, while exercising that power, are immediately undermined as soon as the legislature designates some other body as the proper body to fix "reasonable maximum" rates. The city made a contract within its powers with reference to such rates. No agency of the state can justify an abrogation of such contract by reference to any language contained in said section 6. The power of the legislature under said section 6 is confined to the enactment of laws for the purpose of providing "the manner in which reasonable maximum rates may be established." The exercise of that power is fully satisfied when the legislature creates a tribunal, or governmental agency, for that purpose. That power can be fully exercised by the legislature without in-

terfering with any rates or contracts established or entered into prior to the exercise of that power.

Section 6 means no more than that the body so designated by the legislature shall have the power to fix reasonable, maximum rates, and to that end to exercise the governmental functions which otherwise would be exercised by the legislature. There is no language which indicates that there is any limitation of any kind placed upon the power of the body so designated to surrender or abrogate the rate-fixing power by contract, when authorized so to do.

The Supreme Court of Idaho, in its opinion, page 61 of the record, says:

"Contracts such as the one under consideration, affecting the interests of the people, and imposing exactions and burdens upon them, may be honestly and fairly entered into, and at the time of their execution be equitable and just, and yet, before the lapse of fifty years, or a fourth of that time, by reason of change of conditions, become inequitable, unjust and oppressive upon the people upon whom the exaction is laid, and it is for this very reason that the people have reserved to themselves the power to regulate and prescribe the method of fixing rates in such matters."

The court does not and cannot point out any language which shows the intention to make this power inalienable by the legislative body exercising it.

The Supreme Court of Idaho disclosed the unsoundness of its opinion when it attempted to ground it upon the principle announced in the case of *Louisville & Nashville R. Co. vs. Mottley*, 219 U. S., 467, and kindred cases. In that case a railroad company and an individual had entered into a contract. Neither party to the contract was authorized to represent the sovereignty of the United States of America. Thereafter the Congress of the United States enacted laws inhibiting contracts of the character so entered into. There were two reasons why the contract could not stand as against the act of Congress: First, the Congress of the United States is not embarrassed by the impairment clause of the Federal Constitution; second, neither of the parties to the contract represented the United States of America, and the acts of neither of them could impose any obligation upon the federal government. When a municipality created under the laws of the state, and exercising the powers conferred upon it, enters into a contract, that contract is an exercise of the powers of the state, and the state is represented as a party to such contract, and is bound. Such a contract is protected by the impairment clause of the Federal Constitution.

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*(b) The statutory power possessed by the City of Pocatello at the time Ordinance 86 was enacted.*

The statutory provisions in force at the time Ordinance No. 86 was passed were the following:

"Cities of the second class, and villages governed by this title, shall be bodies corpo-

rate and politic, may sue and be sued, have a common seal, which they may change and alter at pleasure, and such other powers as may be conferred by law." (Revised Codes of Idaho, sec. 2236.)

"Cities of the second class, in their corporate capacities, are authorized to enact ordinances for the following purposes, in addition to other powers granted by this title: \* \* \*

4th. To make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water." (Revised Codes, sec. 2182.)

"In addition to the powers hereinbefore granted to cities and villages under the provisions of this title, any city may, by ordinance or bill \* \* \* ;

36. Acquire by purchase or otherwise, waterworks or plants and illuminating plants, and to supply the municipality and the inhabitants thereof with water and light.

To prevent and extinguish fires, and for that purpose, have power to purchase fire engines, to erect engine houses, to purchase hose carts, hose, hooks, ladders, trucks, buckets, ropes, and all other apparatus, to maintain a fire department, to provide cisterns, hydrants, and waterworks, or to purchase water for fire purposes from others, and maintain waterworks in such town or village in such manner as the trustees by ordinance

determine." (Rev. Stats. of 1887, sec. 2230; Revised Codes, sec. 2238.)

In considering these statutory provisions, it is material to consider the rule in *Wilson vs. Perrault*, *supra*, declaring that the legislature of the State of Idaho cannot fix rates; that it can only designate some other governmental agency to fix reasonable maximum rates; and the consequent result that the specific rates must be a matter of contract between the city and the owner.

Of the above-quoted statutory provisions, section 2182 of the Revised Codes appears to be the broadest in scope. In brief, direct terms it gives the city power "to provide the city with water." None of the above-quoted provisions have been construed, except section 2230 of the Revised Statutes of 1887. In the case of *Jack vs. City of Grangeville*, 74 Pac., 969; 9 Idaho, 291, involving said section 2230, it was held that the board of trustees of the city of Grangeville

"had full power and authority to enter into  
\* \* \* the contract as to the rate to be  
charged the village for water."

It is true that the court, speaking of section 6, Article XV, of the State Constitution, said:

"Under the provisions of said section, it is the duty of the legislature to provide by law the method or means by which rates or compensation may be fixed for the use of water supplied to any city or town, which it is conceded the legislature has failed to do, unless it has been done by the provisions of



section 2711. That section applies to water and canal corporations, and not to the case at bar. Therefore, until the legislature provides a method for fixing rates, the contract between the parties will govern."

Clearly, however, the court merely intended to reserve the question whether the legislature could alter such a contract, until such a question should arise, because, in another part of the opinion, the court says:

"The question as to whether the water rates may be regulated as provided by the laws of this state, is not involved in this case. The trustees do not complain of the contract rate, nor have they fixed any rate. Their claim is that the village is entitled to free water under the provisions of said section of our statutes."

Notwithstanding the fact that the case of *Jack vs. Village of Grangeville* did not decide that the legislature, acting under section 6 of Article XV of the Constitution, could alter or impair the provisions of a contract theretofore entered into, the court in this case fixed upon the syllabus in the *Jack* case, and referred to it as authority for its conclusion. There is no doubt but that the Supreme Court of the State of Idaho in the case at bar was strongly influenced by the decision in the *Jack* case; for, with regard to our Ordinance No. 86, it held:

"In the case at bar, there is no doubt but that under the provisions of the act of February 10th, 1899, (1899 Sess. Laws, p.

192), and particularly section 39 thereof, the City of Pocatello had the power and authority to pass an ordinance and enter into contract with defendant for the establishment of a water system, and supply water to the city and its inhabitants. But any such contract as it was within the power of the city to make, was subject always to the power and authority of the legislature to prescribe the method of determining and establishing reasonable maximum rates to be charged as water rental."

Thereby the Supreme Court of Idaho put this case in the class of cases wherein the contract, when executed, was within the powers of the city, and subject to be altered by virtue of the state's reservation of the power of alteration. We follow the court in its conclusion that our contract is one which the city had power to make, but we do not follow the court to its conclusion that the power to alter was reserved by the state, and in the discussion of the constitutional provisions contained in sections 2 and 6, Article XV, we have presented our reasons in support of our contention that no such reserve power can be implied from these provisions.

We ask this court to hold with the Supreme Court of Idaho that the city had power to enter into the contract contained in Ordinance No. 86. In *Vicksburg vs. Vicksburg Water Co.*, 206 U. S., 496, the powers of the city to make a binding contract were no broader than the powers granted the City of Pocatello. In that case the city was authorized

"to provide for the erection and maintenance of a system of water works to supply the said city with water, and to that end to contract with the party or parties who shall build and operate water works;"

and this court held that under such a power, in the absence of unreasonableness or fraud, a contract fixing definite maximum rates for a definite number of years was valid, and in that case this court followed the construction of said power that had been placed upon the same by the Supreme Court of Mississippi in other cases.

In the case of *Home Telephone Co. vs. Los Angeles*, 211 U. S., 265, this court said, at page 274:

"It is obvious that no case, unless it is identical with its facts, can serve as a controlling precedent for another, for differences slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

In the case at bar the City of Pocatello was given full stature by the general law of Idaho relating to municipal corporations of the second class. It was made a full-grown entity, and charged with the conduct of the city's business. It was specifically authorized "to provide the city with water." It was specifically authorized to acquire waterworks. It was specifically authorized "to provide water works, or to purchase water for fire purposes from others, and maintain waterworks."

At the time Ordinance No. 86 was entered into, the city was the only governmental agency having authority to deal with the rates. In it was lodged the full power of the state with respect thereto.

The power to do these things carried with it the power to make all reasonable contracts that might be necessary in order to carry out the power. Persons who "*provide*" themselves with, and acquire, necessities are usually required to pay for them. At the time Ordinance No. 86 was entered into, and at all the prior dates when the acts of the legislature referred to were passed, it was supposed that the city was under the same necessity, and the power to provide the city with water necessarily meant that the city must either construct its own plant, or contract with someone to furnish water to the city. A contract with another person to supply the city with water necessarily involves some stipulation as to compensation. That compensation ordinarily takes the form of an authority to such person to make certain charges for the water supplied, commonly called rates. The legislature did not see fit to put any limitation upon its broad, general delegation of authority to the city to provide itself with water. The language of this court in the case of *Detroit vs. Detroit Citizens Street Railway*, 184 U. S., 368, at 384, though applied to a different class of rates, and different legislative acts, expresses our argument:

"The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars

thereon through its streets. It would be a subject for careful consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language, permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare that might ruin the whole enterprise?"

Dillon's Munic. Corp. (5th Ed.), sec.  
1212.

It is true that Ordinance No. 86 adopted certain rates which had theretofore been fixed and in effect, and provided that the same should remain in force and effect for a period of five years. To that extent the parties attempted to irrevocably fix the rates for a five-year period of time. That period has expired, and no questions have arisen under that provision of the ordinance. No effort is made by the ordinance to irrevocably fix rates for the period of time beginning with the expiration of the five-year period. The ordinance contemplates that under certain circumstances and conditions it may become necessary to re-establish rates. The ordinance does not provide how these rates shall be established. It does, however, attempt to fix certain terms and conditions which must be observed and occur before any readjustment of rates is made.

These terms and conditions are fixed in recognition of the well-known limitation upon the power of the state, through the exercise of its governmental authority, to establish rates which are confiscatory, and therefore unreasonable. The governmental power to establish rates is limited by constitutional provisions. The power is not an arbitrary power. It is contended that the contract in Ordinance No. 86, providing that no new rates should be established until after appraisement, interferes with the governmental power to fix rates. If that power is arbitrary, it does interfere with it. If, however, that power is limited to the power to fix reasonable maximum rates, the covenant does not interfere with that power, because it merely provides for the determination of certain facts to be presented to the rate-making authorities, on which to base their ruling. If at any time a case is made wherein it appears that the existing rates fixed in the contract are unreasonable, then the maintenance of that rate of income would interfere with the exercise of the governmental power. *If the contract does interfere with that power, the contract should prevail, because the city had the power to make the contract respecting the rates, and, furthermore, because in that respect the city was the ultimate legislative authority.*

The delegation to it of the power to provide itself with water authorized it to draw on the plenary power of the legislature, in so far as that power might be necessary to carry out the purposes which the city was authorized to accomplish. The city was impliedly authorized to contract with respect to the rates, and the legislature having no power to fix the

rates, has exhausted its power by authorizing the city so to do.

Los Angeles vs. Los Angeles Water Co.,  
177 U. S., 558.

*If, on the other hand, the covenant in question does not impinge the governmental powers, then, conversely, the proper exercise of the governmental powers would not impinge the contract.*

*The two primary covenants relate to the method of valuing the property, and the agreement as to the rate return. These two covenants are ordinary business covenants, which do not impinge upon the governmental powers, and consequently the due and reasonable exercise of the governmental powers does not justify any repeal, alteration or abrogation of them. The state has the power, in the first instance, to fix "reasonable maximum rates." The question what is a reasonable rate is a question which depends upon two ultimate questions of fact: First, what is the value of the property involved? Second, what is a reasonable return on that valuation? The parties to the contract contemplated that after the expiration of five years the rates fixed for the first period of the contract might be readjusted, and that some authority might attempt to readjust them; that such readjustment might result in the fixing of confiscatory rates; that such proceedings might then be followed by judicial proceedings, wherein the parties would have the right to show the value of the property involved, and whether the rates fixed were unreasonable and confiscatory; and they devised a scheme for determining the two vital questions of fact at the threshold of their relations. They provided*

for an agreement as to the value of the property, if possible; and, in the event they failed to agree, they provided for a fair appraisal of the property in order to determine the value; and, with full appreciation of the nature of the enterprise, they agreed that 5 per cent, plus reasonable expenses, would be a fair return to the plaintiff in error. By these means they were to see whether the going rates were more than a confiscatory rate as defined by them. In the event that it should appear on such an inquiry that rates lower than the going rates would not yield a fair return upon the investment, then the city agreed not to ask for a lower rate than 5 per cent above expenses, and the plaintiff in error agreed not to ask for a higher rate than 5 per cent above expenses. If we assume, as we must, that no legislative authority has power to fix rates which will yield less than a reasonable return, then the covenant on the part of the city not to ask the legislative authority for rates which would yield less than a reasonable return is not a surrender by the city of its right to ask for, or of the legislative authority to establish reasonable, maximum rates. In no sense is the jurisdiction of the legislative authority ousted. Should the result of the appraisal be that the going rates yield more than the percentage fixed by the ordinance, then the city is at liberty to ask the legislative authority for the establishment of reasonable maximum rates. That authority might, or might not, disregard the valuation fixed by the appraisers. In any event, the action of the legislative authority would not be determinative of the value of the property, or the reasonableness of the rates fixed by it. In any court of equity to which the



plaintiff in error might appeal, the city should be estopped by its covenants for appraisal and net return.

They were executed by the city in pursuance of its proprietary powers; they are business covenants. An expression of this court, used in another connection, defines the situation:

"This is not a matter of economic theory, but of a fair interpretation of a bargain."

*Cedar Rapids Gas Co. vs. Cedar Rapids*, 223 U. S., 670.

In *Omaha Water Co. vs. City of Omaha*, 147 Fed., 1, at pp. 5 and 6, the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said:

"The power to fix and regulate the rates which the inhabitants of a city shall pay to business corporations for water \* \* \* and other public utilities partakes of the nature of a governmental power, and also of that of a business power. \* \* \* The making of a contract for the construction and operation of water works, wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years, is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate, but it is to procure

water and get rates for its inhabitants. Hence it is that the legislature of a state, unless prohibited by its constitution, may empower the city to suspend by contract, and the city may suspend in that way, during a reasonable number of years, its power to regulate the rates which the individual or corporation may collect of private consumers."

In *Detroit vs. Detroit Citizens' St. Ry. Co.*, *supra*, this court, in speaking of street railway rates, said:

"It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities, under the delegated power from the legislature."

See also:

*Pike's Peak Power Co. vs. Colorado Springs*, 105 Fed., 1.

*City of Des Moines vs. Welsbach Lighting Co.*, 188 Fed., 906.

*Ills. Trust & S. Bank vs. City of Arkansas City*, 76 Fed., 271.

It is sometimes not possible to say that a given action of a city is within one of the two classes of powers as distinguished from another. But a contract which bears all the marks of an ordinary business arrangement, of a fair bargain between man and

man, and seeks to fix the rights of the parties in harmony with, and not in opposition to, the public policy of the state, is entitled to be classed as the exercise of the business, or proprietary, power of the city.

In this case the agreements by the parties as to the determination of certain facts are analogous to agreements which are found in everyday contracts, and such contracts are held not to oust the jurisdiction of the courts.

Hamilton vs. Liverpool etc. Ins. Co., 136  
U. S., 242.

The same is true as to stipulations agreeing to facts.

Blankinslip vs. Oklahoma W. & L. Co., 43  
Pac., 1088 (Okla.).

By analogy, our covenants providing for the determination of certain facts do not oust the jurisdiction of any rate-making agency to which the facts so determined may be properly presented.

"In respect to its business powers, a municipality is subject to the same application of the doctrine of estoppel as an individual, or private corporation."

City of Des Moines vs. Welsbach  
Street Lighting Co., 188 Fed.,  
906.

Beadles vs. Smyser, 209 U. S., 393-  
402.

The city's covenants in sections 3, 4 and 5 of Ordinance No. 86 estop the city in any judicial proceed-

ing wherein the facts therein agreed to, or to be thereby determined, are in issue.

If it be assumed, *arguendo*, that the Supreme Court of Idaho is correct in holding that, notwithstanding the covenants in Ordinance No. 86, the plaintiff in error must proceed forthwith to a readjustment of rates, that does not dispose of our complaint that the Supreme Court of Idaho has wholly stricken down our other covenants here involved, and unless its decision is corrected, those covenants which should be a protection to us in any judicial proceedings wherein the confiscatory character of the rates which might be established by some legislative body may be brought in review, are no longer an obligation of the city, or a benefit to us. This result is accomplished by the Supreme Court of the State of Idaho under the guise of a construction of the constitutional provisions above discussed, and section 2839, set forth at length in the statement of facts. In a judicial inquiry, wherein is drawn in question the reasonableness of the rates for public service, the value of the property, and a fair rate of return on the investment, are questions of fact. They are matters which in case of litigation may, and should be, submitted to a master under the proper practice. See:

Lincoln etc. vs. Lincoln etc., 223 U. S.,  
349.

They are facts upon which the parties in such proceedings may estop themselves by pleading, by their acts, and by agreement. In *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S., 401, the allegation in the complaint that the rate was unreasonable was admitted

by demurrer, and the court treated the same as any other allegation of fact admitted by demurrer. In *Prout vs. Starr*, 188 U. S., 537, the plaintiff brought a bill to enjoin the defendants from acting as a rate-fixing body and establishing certain railroad rates. The parties agreed to dispense with the taking of certain evidence, to accept the evidence taken in certain other cases, and to abide by the decrees therein entered. Such procedure was approved. In the case of *Wilcox vs. Consolidated Gas Co.*, 212 U. S., at 47, this court held that the State of New York was, by its acts, estopped from denying the value of certain franchises involved in the inquiry. In *re Arkansas Rate Cases*, 187 Fed., 290, District Judge Trieber said:

"By the acts of complainants, the Court is relieved of a very difficult problem,—that of the valuation of the property. In the bills of complaint the railroads ask for only compensatory rates on the basis of valuation according to the assessment of their property for taxation by the State of Arkansas made by the State Board of Railroad Assessors. Its reasonableness is, of course, conceded by the defendants, and therefore there is no necessity for the court to determine what rule should govern in ascertaining what the investments on which complainants are entitled to a reasonable compensation are."

In *Cedar Rapids G. L. Co. vs. Cedar Rapids*, 144 Iowa, 426; 120 N. W., 966, at 973, it was held that the question, What is a reasonable rate? was

a question of fact. In *People ex rel. Manhattan vs. Woodbury*, 203 N. Y., 231; 96 N. E., 420, the court said:

"Whether the rate of return to be allowed to the railroad upon its tangible property, or whether the rate at which the net income should be capitalized, should be 6% as determined below, was a question of fact decided upon concededly conflicting evidence, and is one, therefore, with which this court should not interfere."

So far as any conditions which yet exist are concerned, the rate of return provided in the ordinance is, regardless of the contract, reasonable. The Supreme Court of Idaho expressed a fear that it might become unreasonable. So far as this record is concerned, that rate must be considered reasonable, because, in the answer filed by the plaintiff in error, the allegations of the petition were denied, and no proof was taken in support of these allegations. Certainly, as these covenants now stand, no case is presented where the rate-making power can act within constitutional limitations. If the time comes when a showing can be made by the city that, as a matter of fact, 5 per cent, plus expenses, is an unreasonably large return, we may be called upon to defend that covenant. The only point where our covenants come in conflict with the legislative powers of the state is the point at which it is sought to exercise these powers arbitrarily, and without regard to the salient facts which ought to be a basis for any reasonable rate-making. Such cannot be said to be a substantial

encroachment. Rather are the covenants in question of the class defined in the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, as covenants "which do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party." In the last-cited case the court was speaking of a contract between the city and the water company wherein the city has agreed not to build a competing plant. As a matter of logic, such contract did impinge a governmental power, and yet, in substance, it was intended as a fair business agreement. Speaking of such a covenant, this court said:

"An agreement of this kind was a natural incident to the main purpose of the contract, and the power given to the city by its charter to provide a sufficient supply of water and to grant the right to use the streets of the city for the purpose of laying water pipes, to any person or association of persons, for a term not exceeding twenty-five years. In establishing a system of water works, a company would necessarily incur a large expense in the construction of a power house, and the laying of its pipes through the city, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. \* \* \*

Cases are not infrequent where, under the general power to cause the streets of a

city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years, but these cases do not touch upon the question how far the city, in the exercise of the undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of other people."

Approved in *Vicksburg vs. Water Works Co.*, 202 U. S., 453, 467, 468.

With regard to the power of the city to make the covenants contained in Ordinance No. 86, we submit that the city did have power by such covenants *to fix the rates* for a term of years; that in making the covenants in Ordinance 86 it was well within its powers; that the covenants here in question are in fact an exercise of the proprietary powers of the city, and constitute a fair bargain, and enforceable obligations.

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#### 6. *Reasonableness of the Contract.*

The Supreme Court of the State of Idaho in this case takes occasion to advert to the provisions in the contract with reference to the selection of the Board of Appraisers, with reference to the provision directing the evaluation of "rights of way, natural and acquired advantages, franchises," and the provision



with reference to a return of 5 per cent, plus reasonable expenses, in language which implies a criticism of the reasonableness of these covenants. We are not now concerned with the question whether certain tests adopted in the contract for the purpose of determining the value of the property and the reasonableness of the return thereon are tests which would be applied in case of judicial review in the absence of such contract. The tests ordinarily applied in such cases are notoriously inaccurate and unreliable, and an agreement with reference thereto must necessarily involve mutual concessions. Whether the covenants in sections 3, 4 and 5 of Ordinance No. 86 are reasonable or not depends on whether or not they are the result of a *bona fide* effort to rightly establish the material facts of which they treat. We submit that if the covenants in sections 3, 4 and 5 of Ordinance No. 86 are unreasonable, then, until there is an entire revolution in legislative policy toward municipalities, no assurance can be given an investor in such public service upon which he can base any expectation as to the income from his investment. He can have no protection whatever against arbitrary rates fixed by a prejudiced body acting with notoriously hostile minds, except the protection that lies in the judicial review of the rates so fixed, in which judicial proceedings he must bear throughout the burden of showing their confiscatory character, the result of which, in common with all litigation, is uncertain. Which is especially uncertain in view of the notorious and obvious lack of any definite measure by which to determine values and establish a reasonable return thereon. Today nearly every rate estab-

lished by a rate commission is dragged into the courts. Any effort made by the parties in good faith to reach a conclusive determination of the vital facts upon which the rates depend, outside of the courts, ought to commend itself as a step consonant with sound public policy. In the case of *City of Knoxville vs. Water Co.*, 212 U. S., 1, at 18, this court said:

"The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting, where the proof is clear. The legislature and subordinate bodies to whom the legislative power has been delegated ought to do their part. Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it, will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

The foregoing statement has a general application beyond the facts in the case in which it was uttered. It declares a sound public policy which can

be effectuated in other ways besides the furnishing of information to rate-making bodies. The plan adopted in Ordinance No. 86, if upheld by this court, will commend itself generally, and will bring about the readjustment of rate difficulties between the parties themselves, without depriving the public of the right to protect themselves against improvident and unreasonable action on the part of municipalities.

*(a) The Board of Appraisers.*

Ordinance No. 86 requires the valuation of the water system of the plaintiff in error by a Board of Appraisers consisting of "experienced and disinterested hydraulic engineers, who must be members of The American Society of Civil Engineers;" two selected by the city, two by the plaintiff in error, and a fifth, if necessary, to be appointed by the president of the American Society of Civil Engineers at the request of the four. It would be difficult to devise a plan for selecting a committee better qualified to reach a just and fair conclusion. Intricate and involved matters of technical knowledge predominate in such an inquiry—matters requiring skilled judgment and educated experience for their determination. This method calls to the aid of the city and owner the very best obtainable skill in the determination of the troublesome questions of fact involved, and the results of the deliberation of such a board ought to be welcomed by any governmental agency having the duty to treat with and consider any subject-matter having for its most important element such questions of value. Such a plan is reasonable, wise, prudent and highly desirable.

*(b) The basis of valuation.*

No conclusive basis of value can be deduced from the rate cases. Various factors have been considered by the courts and rate commissions. The same factors have been given differing weight in differing cases. The following factors have been considered:

1. Market value.
2. Cost of reproduction.
3. Actual cost, and factors considered in determining same.
4. Land valuation, and appreciation or depreciation thereof.
5. Donated property.
6. Property constructed or acquired from surplus.
7. Discarded property.
8. Price of materials during construction period.
9. Piecemeal construction.
10. Physical depreciation.
11. Market depreciation.
12. Going concern value.
13. Franchise value.
14. Hazards of business.
15. Legal rate of interest.
16. Sinking fund.

All of these factors, and perhaps some which have not yet been presented, may be considered in reaching a conclusion as to the value of the property involved, and reasonable income thereon. The weight to be given each factor varies in each case, and it is impossible in any case to give to any one factor conclusive consideration. Those who are most intimately

informed of the facts, conditions and circumstances surrounding such an enterprise are qualified to say what factors should fairly be used as controlling in a given case.

At least one unprejudiced writer upon the subject has said:

"Under the circumstances of the particular case, one or the other of the above items may be given controlling weight in a determination of the present value, *or may be agreed upon by the parties as the proper test.*" (Italics ours.)

Legal Basis of Rate Regulation, 11  
Columbia Law Review, No. 6, pp.  
537-538.

Ordinance No. 86 provides that there shall be submitted to the Board of Appraisers the question: "For what sum can the water system of James A. Murray be now duplicated?" (p. 10 of the record); and further provides:

"In fixing the value of the said water system, whether for the purpose of sale, or the readjustment of rates, the water system of the said James A. Murray \* \* \* shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances, machines, tools, implements, storage grounds, material on hand, and all rights and prop-

erty of what kind soever, either in use or on hand and belonging to the said James A. Murray in his capacity of furnishing water for any and all purposes to himself and to his customers at Pocatello, Idaho."

In short, the appraisers are to use the cost of reproduction and the going value. The cost of reproduction is a fair test of tangible value as applied to water systems. From the standpoint of the city, it is more than favorable. It excludes actual cost, actual investment, discarded property, and like features, which would tend to increase the value fixed. We submit that the adoption of this test shows a *bona fide* effort on the part of the city and the plaintiff in error to arrive at a fair basis of value. At page 69 of Whitten's work on Valuation of Public Service Corporations it is said:

"The general trend of recent decisions has been to make reproduction cost the sole or controlling basis of value for rate purposes."

The author then cites a number of cases, and on page 69 and succeeding pages refers to numerous decisions by the courts and by rate commissions whereby that test has been adopted.

The covenants in the ordinance in this respect ought not to be declared unreasonable because the test applied is not the test which, in the judgment of this court, would be applied in a judicial proceeding, if, as a matter of fact, the test adopted shows an intention to fairly appraise the value. It is apparent

that the question to be submitted to the appraisers may exclude from their consideration the question of depreciation; but, on the other hand, to offset that, the rate of income provided for does not include an allowance for depreciation, sinking fund or obsolescence. In *San Joaquin & Kings R. C. N. E. Co. vs. Stanislaus*, 163 Fed., 567, at 572, Circuit Judge Morrow recognized the interdependence of these two factors, saying:

"But if we admit the claim of deterioration, it has this aspect to be considered: That if a deduction is to be made from the value of the plant on this account, then an allowance should be made for such deduction and added to the annual income, to enable the complainant to renew and reconstruct so as to preserve the integrity of the plant."

The items enumerated in section 5 of the ordinance last above quoted are items which are to be taken into consideration in determining the going-concern value of the plant. The value of the tangible property when used in a going business is greater than its mere intrinsic value. One is a live value; the other is a dead value. The Supreme Court of Idaho seems to take no exception to this, except in so far as the "rights of way, natural and acquired advantages, and franchises" are concerned. It did not approve a plan by which

"Murray proposed to collect rates sufficient to make a five per cent income on the value of rights of way and franchises that the public had given him."

Our contention on this point is stated in vigorous language by the Circuit Court for the Southern District of Iowa, in *Des Moines Water Co. vs. City of Des Moines*, 192 Fed., 192. In that case the court said:

"There can be no true test other than the physical valuation. And to such physical valuation there may be added certain other items. \* \* \* The master has found and fixed a valuation upon this property as a going concern as distinguished from the naked plant. As to this, both reason and authority sustain him. Everything of a business character is thus valued. The peanut, or news stand, on the street corner, the trunk line railroads and the street railroad systems, the city and the village stores, the newspapers, the carriages for hire in the cities, dairies, bus lines, and every conceivable business proposition, has a greater value when the business is established, and it is set going, over and above what such value would be when but ready for operation. A telephone system may have its wires, but before the system can be profitable it must have its patrons. It takes money and effort to get patrons. While obtaining patrons, the capital stock is earning but little or nothing. The street car system may have laid its rails and built its power plant, and have bought its cars; but it does not have the value that it afterwards will have when its business is adjusted, and the people have adjusted their business and their



conveniences to work in harmony with the system thus established. The newspaper plant may have its editors and reporters, and its presses, offices and buildings. The physical valuation is just the same in one case as in the other. But two newspapers, possessed of equal physical valuation, are not of the same value, as everybody knows. Two merchants may have the same stock of goods, as to value, and may be equally well located, and may own the same amount of real estate, in value. It is not material whether we call it 'good will,' or the 'value of the going concern,' but there is an intangible value there, and the owner has the right to have it determined, on such increased valuation.

These rules apply with equal force to a waterworks system. It took a long time to build up the system. First, it had to get in touch with patrons, make contracts, install meters, and establish the business. During that period the capital stock was not earning what it should have earned. Now that it is a going concern, it is entitled to have these values considered, in arriving at the true value of the plant. Such reasoning is endorsed by courts, both national and state Supreme Courts, and such conclusions are the result of sound reasoning. Such are the

tests in all other vocations and business enterprises."

Whitten's Valuation of Public Service Corporations, chap. 22, p. 466, sec. 560 *et seq.*

Omaha vs. Omaha W. Co., 218 U. S.,  
202.

Ordinance No. 86 does not say what valuation should be placed upon the different elements enumerated, but says they shall all be considered. The franchise value is merely an element in determining the going-concern, or live, value of the system. It is rarely that a franchise in itself has any value, but through the efforts of the owner of the franchise in building the business, the franchise becomes a valuable thing. But its value is not alone the gift of the people. It is the gift of the people, plus the efforts and expenditures of the owner of the franchise. As such, it is his property, and he is entitled to a return upon the property so created by him out of the advantages given him by the state. See:

Whitten on Valuation of Public Service Corporations, p. 592.

The case is very clearly stated by one writer, as follows:

"Franchise value is based upon good will. It is part of the 'going value' of the utility. It is either large or small according to the progressiveness of the company. The right to use the streets is worth nothing

until the actual use of the street under that right produces value. It is the company's effort to serve the people that produces franchise value. If the people can be satisfactorily served at a profit, the franchise is valuable. If they cannot be served at a profit, the franchise has no value,—as witness countless interurban franchises and competitive gas and electric franchises that cannot be used. If the people cannot be served satisfactorily, the franchise loses value. Franchise value is merely a measure of the company's efficiency in serving the public."

We submit that it cannot be said that the agreement in Ordinance No. 86 that rights of way and franchises shall be considered in valuing the property is unreasonable from the standpoint of the city.

#### *(c) Rate of Income.*

The Supreme Court of Idaho was not, of course, considering whether certain established rates were fair and reasonable. On the record before it, the allegation in the petition that the going rates were unreasonable was met by a denial in the answer, to which answer a demurrer was filed. Therefore, it cannot be considered in this case that the going rates are unreasonable in fact. Nor did the Supreme Court of Idaho say that 5 per cent, plus expenses, is now an unreasonable rate. Its position is that the rate of income fixed in the contract may, at some time,

become unreasonable, and, therefore, it is not reasonable to provide for a fixed rate of income by contract. Until it properly appears before a court of competent jurisdiction that the rate of income fixed by the contract is unreasonable, we are not required to meet the city's contention that such a contract may be abrogated on the sole ground that the fixed rate of income is exorbitant and unreasonable. So far as any known conditions that now exist, or have heretofore existed, are concerned, the rate of income fixed by the contract is eminently fair and reasonable. The legal rate of interest in Idaho is fixed at 7 per cent by section 1537 of the Idaho Revised Codes. No allowance is made the plaintiff in error for depreciation, or for obsolescence of the plant. No consideration is given to the hazardous character of the business, which might have been fairly considered, and for which the plaintiff in error might have fairly received an allowance. The materiality of this factor in determining rate income is forcibly stated by the court in *Des Moines Water Co. vs. Des Moines*, 192 Fed., 192, *supra*, wherein the court said:

"The waterworks company claims that certain very specific things by name should be allowed, either by way of enhancing the value of the property, or that which would be the same thing, by calling them hazards, and allowing such rates as would produce a reasonable revenue thereon. One of these is the fact that rates are subject at any time to change by a city council subject to local prejudice, and without experience or training with reference thereto; The hazard that the

city can at any time enforce an involuntary sale by proceedings in condemnation. The fact that the franchise cannot extend beyond twenty-five years, with no assurance that it will be renewed. Another, or competing plant may be allowed. The city can establish a competing plant,—and other minor hazards.

There can be no question but that some of these matters should be given consideration. The greater the hazard, the higher the rate of interest. A farmer who observes his contracts and pays his debts can get a loan at a low rate of interest by a mortgage on his farm. A man whose credit is not good, and who can only tender security of a doubtful character, must pay a high rate of interest. This has always been so, and always will remain so. The fact that the company's charter may be revoked by a forced sale, or that it may expire at the end of 25 years, and that it will be continuously kept in litigation, are all hazards, which in other business enterprises would increase the rate of interest that the borrower must pay, and justly entitles it to a higher rate of earnings than if its earnings were certain and fixed, and were in perpetuity or of long duration. But it is well nigh impossible to point out just what particular hazard, and to what extent such a particular hazard, will increase the rate of interest, or will entitle it to a higher rate of earnings."

Not all of the hazards referred to in the above quotation are present in this case, but some of them are, and none of them appear to have been considered. In Whitten's work on Valuation of Public Service Corporations, pages 649-712, there is collected what purports to be a complete catalogue of the rate cases that have been decided by the courts and by the rate commissions, and from a perusal of the cases there collected we venture the assertion that it is rarely that less than 5 per cent net return is allowed, and that in the great majority of cases 6, 7 and 8 per cent has been adjudged a fair return. In all cases this allowance is above expenses, depreciation and obsolescence. We submit that in this aspect the contract bears upon its face the evidence of a reasonable effort to do justice between the parties.

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*(d) Appraisal as a condition precedent to rate-making.*

If the covenants providing for a determination of value, and adopting a minimum net income, are held to be of a class of covenants which it was permissible for the city to make, it was not unreasonable to provide for such appraisal as a condition precedent to a change of rates. Assuming that the result of such an appraisement and the covenant as to such rate of income would be binding upon the city, either in rate-making proceedings, or in case of judicial review, it would be idle to proceed to the establishment of rates until after a valuation has been made. It would be idle for a rate-making body to proceed upon one basis of fact, when, upon a judicial review, the parties

As a demonstration of the arbitrary and unreasonable effect of the act, we call attention to the class from which the personnel of the rate commission must be made up. All of the members must be taxpayers of the city, two of whom the plaintiff in error is permitted to select. We are aware that this court has held that the governing body of the city may be authorized to exercise the rate-making function. There is a reason why the *city council or governing body* of a city may be given such a power. Theoretically, at least, they are elective officers, representing the public—the lawful protectors of the health, safety and property within the municipality. Theoretically, at least, they are no more in duty bound to the taxpayers than they are to the owner of the public utility. The city council makes the contract for water, but it is made for the benefit of the citizens and property-owners as the real parties in interest. But there is no reason, theoretical or otherwise, why any particular taxpayers or citizens of the municipality should be charged with the protection of the property of any of the others. Their relations to the public-service company are necessarily hostile. They do not stand in actual or theoretical neutrality. Entrusting the fixing of rates under the contract to the tender mercies of a commission of taxpayers is both in theory and in fact entrusting to the real parties in interest on one side of the contract the power to dictate to the real party in interest on the other side of the contract what shall be allowed for the use of his property, and puts into the hands of those truly hostile and adversely interested to the owner of the water company, the power to put their own interpretation upon

their own obligation to the other party to the contract.

The duty imposed upon the legislature by section 6 of Article XV of the Constitution, is not to provide the manner of fixing rates, but the manner of fixing "reasonable maximum rates;" and although section 2839, Revised Codes of Idaho, provides: "The rates to be charged for water must be determined by commissioners," that law must yield to the constitutional provision of that state which limits the legislature to the power to prescribe some manner of fixing "reasonable maximum rates." If the legislature has any reserve power to alter or amend the contract in Ordinance No. 86, it is limited to the case where the rates fixed in Ordinance No. 86 are in excess of a reasonable maximum.

The Constitution of Idaho requires the legislature to provide the method in which reasonable maximum rates to be charged for water shall be established. It is only when established rates are *unreasonable* that the statute can be held to apply—and then only to the extent of establishing the maximum rates to be charged.

An attempted application of the law of Idaho (Revised Codes, sec. 2839) relating to the appointment of commissioners to determine rates to be charged for water furnished, would, in the absence of a showing that the rates established by agreement of the parties are unreasonable, impair the obligation of a contract.

The provision of the Idaho State Constitution under consideration, section 6, Article XV, reads as follows:



"The legislature shall provide by law the manner in which reasonable maximum rates shall be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

The duty imposed upon the legislature by the Constitution is not to provide the manner of fixing rates. In assuming to provide by law the manner in which rates shall be established, it has exceeded its authority under the Constitution. For the purpose of illustrating the distinction, we quote from the Constitution of California, Article XIV, section 1, a provision which has been frequently under consideration by the courts of that state and of the United States in rate cases. The section of the California Constitution referred to opens with the declaration:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."

An identical provision is contained in the Constitution of Idaho, Article XV, section 1.

To continue the quotation from the California Constitution:

"Provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, shall be fixed annually, by the board of

supervisors, or city and county, or city, or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

It will be noted that the Constitution of California imposes upon the authorities of the municipality the absolute duty of fixing water rates. These must be fixed annually, and are to continue in force for one year and no longer. Should the municipality fail to pass the necessary ordinances or resolutions, they may be compelled by law so to do; penalties are also provided for charging rates other than those so established.

Has the legislature of Idaho, in the enactment of a statute relative to the fixing of rates, followed the Constitution of Idaho or the Constitution of California?

We quote from the act of the Idaho legislature of March 16, 1907 (Revised Codes of Idaho, sec. 2839), as follows:

"All persons, companies or corporations supplying water to towns and cities must furnish pure, fresh and healthful water to the inhabitants thereof \* \* \* at reasonable rates established in the manner hereinafter provided."

The act then proceeds:

"*The rates to be charged for water must be determined by commissioners to be selected as follows:*" \* \* \*

That there is no authority in the Constitution for the legislature of Idaho to fix rates was decided by the Supreme Court of Idaho in *Wilson vs. Per-rault, supra*, wherein the court held that the provision of the Constitution above quoted deprived the legislature of the power to prescribe rates to be charged for the use of water furnished to the public.

Whatever the language of the law, the law must be interpreted in the light of the provisions of the Constitution which restrict the legislature to prescribing the manner in which "reasonable maximum" rates shall be established.

The only governmental power which could be conferred upon a commission would be to fix "maximum" rates to be charged for the use of water sold. The word "reasonable" was used advisedly by the

framers of the Constitution. It has a meaning and an application. It is only in instances where rates are unreasonable that section 2839 can be held to have any application whatever, it must be made to appear that the rates established by agreement of the parties are unreasonable before section 2839 can be applied.

To reiterate: It is only reasonable rates which a commission can have authority to establish. If reasonable maximum rates are already provided by contract, there is no excuse for the appointment of a commission, nor for the fixing of rates by a commission. It is evident that the purpose of the framers of the Constitution was to furnish protection to the public against monopoly, not to invalidate and destroy contracts already made in which rates are reasonable.

Counsel for the city at the time of the institution of the proceedings for the writ of mandate in this case thought it necessary to predicate its right upon the unreasonableness of the going rates; for, in their application to the court for the writ, they declared that the present rates are unreasonable (Record, VII). This allegation of the petition for the writ of mandate was denied by Murray in his answer, and no proof was offered in support of the allegation.

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### CONCLUSION.

We ask that the motion to affirm be denied. We ask that the judgment in the Supreme Court of Idaho, to which the writ of error herein is directed, be reversed. We submit that the plea of *res judicata* asserted in this case is well taken. We submit that the covenants in Ordinance No. 86 were made in the exercise of due and lawful authority by the City of

Pocatello; that neither the legislature nor the city is vested with any reserve power to abrogate these covenants, or any of them. We submit that the obligation of that covenant which provided that no change in rates fixed by the ordinance should be made until after appraisal, and unless the going rates were found to yield more than 5 per cent plus expenses on a valuation determined by means of such appraisal, has been impaired by the judgment of the Supreme Court of the State of Idaho, based upon section 2839 of the Revised Codes of Idaho, and the resolution of the city council of the City of Pocatello passed pursuant thereto. We submit that the obligations of the covenants in Ordinance No. 86 providing for an appraisal of the properties of the plaintiff in error in the event of an attempt to alter the going rates, and the covenant therein fixing 5 per cent, plus expenses, as a reasonable return on the appraised valuation, has been impaired by the construction which the Supreme Court of the State of Idaho has given in this case, and the acts of the legislature and the resolutions of the city council, and we ask this court for such orders in the premises as will assure us the protection of the Constitution and laws of the United States to which we have shown ourselves to be entitled.

Respectfully submitted,

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# **In the Supreme Court of the United States.**

OCTOBER TERM, 1911.

No. 1015.

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**JAMES A. MURRAY, DOING BUSINESS AS THE PO-  
CATELLO WATER COMPANY, PLAINTIFF IN  
ERROR,**

**VS.**

**THE CITY OF POCATELLO.**

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*In Error to the Supreme Court of the State of Idaho.*

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**BRIEF OF PLAINTIFF IN ERROR ON MOTION  
TO AFFIRM.**

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## **STATEMENT.**

The plaintiff in error invokes the jurisdiction of the Supreme Court of the United States on writ of error to the Supreme Court of the State of Idaho on two grounds.

First—Because section 2839 of the Revised Codes of the State of Idaho, as enforced by the city council of Pocatello by ordinance of July 6, 1911, and as construed and enforced by the Supreme Court of the State of Idaho, impairs the obligation of contract be-



tween the plaintiff in error and the City of Pocatello, contained in Ordinance 86 of June 6, 1901.

Second—Because the Supreme Court of the State of Idaho, in judicial proceedings terminating in a judgment to which this writ of error is directed, refused to give full faith and credit to a final judgment theretofore entered by the Circuit Court of the United States for the District of Idaho in a suit in equity between the same City of Pocatello as plaintiff, and the same James A. Murray, so doing business as The Pocatello Water Company, as defendant, wherein it was decided that the said section 2893 of the Revised Codes of the State of Idaho did in fact and in law impair the obligation of the said contract contained in said Ordinance 86 of June 6, 1901.

On June 6, 1901, the date of the passage of the said ordinance, the following constitutional provisions and statutes of the State of Idaho were in force:

First—Section 2 of Article XV of the State Constitution, which provides as follows:

“The right to collect rates for compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by the authority of, and in the manner prescribed by, law.”

Second—Section 6 of Article XV of the State Constitution, which provides as follows:

“The legislature shall provide by law the manner in which reasonable maximum rates shall be established, to be charged for

the use of water sold, rented, or distributed, for any useful or beneficial purpose."

Third—The twelfth subdivision of section 2230 of the Revised Statutes of 1887, being a subdivision of the section conferring powers on cities of the second class, in which the City of Pocatello was then included, which subdivision provides as follows:

"To prevent and extinguish fires, and for that purpose have power to purchase fire engines, to erect engine houses, to purchase hose carts, hose, hooks, ladders, trucks, buckets, ropes, and all other apparatus to maintain a fire department, to provide cisterns, hydrants, water works, or to purchase water for fire purposes from others, and maintain water works in such town or village, in such manner as the trustees by ordinance determine."

Fourth—The fourth subdivision of section 39 of the general laws of the State of Idaho of 1899, page 196, concerning powers of cities, which subdivision provides as follows:

"4th. To make regulations to secure the general health of the city and to prevent and remove nuisances and to provide the city with water."

The terms of said Ordinance 86 are as follows:

#### ORDINANCE No. 86.

An ordinance confirming and continu-

ing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the City of Pocatello with James A. Murray for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means for ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions, or of granting to others more favorable terms or franchises than that now held and granted to said James A. Murray.

PREAMBLE.

WHEREAS, The town or village of Pocatello, on the fourth day of January, 1892, conferred and granted to F. D. Toms, John J. Cusick, and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the town or village of Pocatello for the period of fifty years, for the purpose of laying along,

over and under said streets, alleys and public highways, water mains, pipes and conduits, for the purpose of furnishing and supplying the said town or village of Pocatello, and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and,

WHEREAS, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said condition precedent, and obtained vested rights under said grant; and

WHEREAS, the City of Pocatello is a city of the second class and is the legal municipal successor of the said town or village of Pocatello; and

WHEREAS, a commission duly appointed and constituted did on or about the first day of September, 1896, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, then owner and holder of said privileges and franchises, for both public and private uses, which said rates were confirmed and continued by the provisions of Ordinance No. 56, approved June 8th, A. D. 1898; and

WHEREAS, the rates and charges so fixed and continued are now deemed and considered to be fair, equitable, reasonable and just, and will continue to be fair, equit-

able, reasonable and just, in the near future; and

WHEREAS, the said James A. Murray has succeeded to and is now the owner and holder of all property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including said water system complete, and all rights, privileges and franchises appurtenant thereto, or used therewith; and

WHEREAS, the present supply of water furnished by said water system is deemed inadequate for the present and future need of the said city, and said James A. Murray agrees to bring in the waters of Mink Creek and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money; and

WHEREAS, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and

WHEREAS, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best in-

terest of the City of Pocatello, to extend and give the assurance asked for:

NOW, THEREFORE, be it ordained by the Mayor and Council of the City of Pocatello:

Section 1. That the privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello Town or Village Ordinance No. 46, passed and approved January 4th, 1892, are hereby ratified, continued and confirmed unto James A. Murray, and to his successors and assigns according to the terms of said original grant, he, the said James A. Murray, being the legal successor of the said F. D. Toms, John J. Cusick, and James A. Murray, therein named.

Section 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company, to the City of Pocatello, and the inhabitants thereof heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the first day of September, 1896, and now in full force and effect within the said City of Pocatello, is hereby declared to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said

James A. Murray, for both public and private uses, except as hereinafter stated, to-wit:

[Here follows detailed schedule of water rates.]

Section 3. The foregoing rates and charges are hereby adopted by the City of Pocatello, by and for itself, and as trustees for the use and benefit of all private consumers of water within the corporate limits of said city for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system shall exceed five per cent above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of Section Two of this Ordinance, may be readjusted so as to yield not less than five per cent above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section four.

Section 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section three, and if the City of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascer-

tained and determined in the following manner, to-wit:

A committee of four experienced and disinterested hydraulic engineers who must be members of the American Society of Civil Engineers, shall be selected, two by the City of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth, and if they cannot agree upon a fifth, they shall request the President of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of the said water system for the purpose of readjusting said rates and such decision shall be final.

Section 5. The city of Pocatello shall not hereafter grant to any individual, corporation, or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, confirmed and continued in said James A. Murray; nor shall the City of Pocatello build, acquire, own or operate a water system of its own, until it has in good faith offered to purchase the water system of the said James A. Murray or his successors or assigns, at a price to be ascertained as follows: If the owners



of said water system and the City of Porttello cannot agree upon the price then a committee of experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers shall be selected in the manner set forth in section four of this ordinance, who shall fix the value of said water system for the purposes of such sale, and the decision of a majority of such committee shall be final.

At intervals of five years from the approval of this ordinance and during a period of ninety days, immediately following the completion of each five year interval, the city may purchase the water system of the said James A. Murray, or his successors or assigns, under the conditions specified in this section, but at no other time except by mutual consent of the city and the owner of said water system.

In fixing the value of the said water system, whether for the purpose of selling or of readjusting rates, the water system of the said James A. Murray, or his successors or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, offices, barns, appliances, machines, tools, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand and belonging to the said

James A. Murray, in his capacity of furnishing water for any and all purposes to himself and to his customers at Pocatello, Idaho, saving and excepting account books and records; and each article of property aforesaid shall be separately considered and evaluated by said committee; and in the event of the City of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the said city shall receive and pay for the whole plant as aforesaid, the said James A. Murray stepping out, and leaving all said property undisturbed and ready for the city to step in.

Section 6. Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances. Such compliance with this ordinance shall entitle the said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.

Section 7. That in consideration of the improvements named in this ordinance, the city of Pocatello hereby agrees to rent, receive and pay for, not less than forty-five (45) fire hydrants, at the schedule rate named in section 2 hereof; and within ninety days after the passage and approval of this ordinance to designate points on the water mains at which the extra hydrants shall be placed as soon as may be, the hydrants to be subject to rental from and after the date of their being placed in position.

Section 8. If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed this 6th day of June, 1901.

T. O. SMITH,

City Clerk.

Approved this June 6th, 1901.

THEO. TURNER, Mayor."

After the passage of said ordinance, and on the 16th day of March, A. D. 1907, the legislature of the state passed an act which is now section 2839 of the Revised Code of Idaho, which provides as follows:

"Sec. 2839. All persons, companies or corporations, supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water, may, from time to time establish, and at such rates as established in the manner hereinafter specified; and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified.

The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the town or city au-

thorities, or when there are no town or city authorities, then by the board of county commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; said town or city authorities must, within ten days after the appointment of the two commissioners so selected, give notice in writing to said person, company, or corporation supplying water, of the appointment of such commissioners, and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or city, must be selected by the person, company, or corporation supplying water, and in case a majority of the four commissioners so selected cannot agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or city, and if they cannot agree upon a fifth commissioner, then the probate judge of the county, must, within ten days after notice to him by said commissioners, that they are unable to agree upon a fifth commissioner, select a fifth commissioner qualified as aforesaid. The decision of a majority of the commissioners so selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days

from the date such board of water commissioners is complete: Provided, That any person, company, or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, That nothing in this section contained shall relieve said town or city authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a franchise to any person, company, or corporation, to supply water as aforesaid: Provided, further, That said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one-half of said sum to be paid by the town or city, and one-half by such person, company, or corporation supplying water: Provided, further, That said commissioners shall be empowered to incur any other expense that may be necessary to aid them in establishing such water rates, and one-half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

This section is found on pages 2, 3 and 4 of the brief in support of the pending motion. On January 19, 1909, the City of Pocatello, as plaintiff, brought

its bill of complaint against James A. Murray, doing business as The Pocatello Water Company, as defendant, in the then Circuit Court of the United States for the District of Idaho (Exhibit B, printed pp 30-37, inclusive, of the record), which bill, omitting jurisdictional allegations, alleged in substance as follows:

That the said ordinance was accepted by the said Murray; that the plaintiff is entitled to have a new schedule of water rates and charges fixed; that the rates and charges fixed in ordinance 86 have ceased to be reasonable and proper, because of increased demand for water, and the inferior and unsatisfactory service; that the prevailing rates are excessive, extortionate and oppressive; that the legislature has provided for the determination of the rates by means of commissioners, as provided in said section 2839 of the Revised Codes of Idaho; that, pursuant to the said section of the revised codes, the said city has appointed two commissioners, and James A. Murray has refused to appoint two commissioners, though requested so to do; that the said James A. Murray has been since the 28th day of July, 1908, and now is, absent from the State of Idaho, and the plaintiff is unable to procure personal service upon the said Murray; that the said Murray remains without the state for the express purpose of defeating the appointment of commissioners under the laws of Idaho, and to defeat the fixing both of

new rates or charges for water, and for the purpose of preventing the service of subpoena in this action, and for the purpose of hindering, delaying and preventing the plaintiff from recovering its demand; that the plaintiff has no plain, adequate or speedy remedy, and invokes the jurisdiction of a court of equity; that said James A. Murray fraudulently, wrongfully and maliciously failed, etc., to join with the plaintiff in fixing and providing new rates and charges for furnishing water to the city and its inhabitants, and has forfeited to and owes the city the sum of fourteen thousand three hundred dollars as a penalty under the provisions of said section 2839, no part of which has been paid; that the said waterworks plant and water system of said James A. Murray is mortgaged in the sum of four hundred thousand dollars, which exceeds the present and probable future value of said waterworks and plant; that the monthly cash revenue of said waterworks plant is now about five thousand dollars; that the same is collected and disposed of by one George Winter, sole manager, director, agent and superintendent, which sum is, by the direction of the said Murray, remitted by said Winter and of the State of Idaho monthly, and into the States of Montana and California; that the said sums are so withdrawn from the State of Idaho with the fraudulent design and intent to withdraw the same from



the jurisdiction of the courts of the State of Idaho and of this court; that in the event of recovery by the plaintiff of its demand, or any part thereof, the property of the defendant remaining within the State of Idaho will be wholly insufficient to meet and pay the same, or any part thereof, and there will be no moneys or revenue of the said waterworks plant and water system, belonging to the defendant, which may or can be reached by legal or equitable process out of this or any other court, and applied to the liquidation of any judgment which the plaintiff may recover, and that in order to protect the rights of the plaintiff it is necessary that a receiver be appointed by the court, to collect and safely keep the monthly cash revenues of the said waterworks plant and water system, and to hold the same subject to the order of the court, and to expend and apply the same, or such part thereof as may be necessary, in such manner and for such purposes as this court may hereafter order and adjudge in the premises; that in order that the plaintiff may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by said James A. Murray under his franchise, to the plaintiff and its inhabitants, for the period of three years now next ensuing, or any part of such relief, it is necessary that this court interpose and intervene by an exercise of its equity powers, and proceed to

make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to this court shall seem meet and proper. The prayer for relief was, first, for subpoena; second, that the court make, fix and promulgate reasonable charges for water to be furnished by the defendant under his franchise for the period of three years from the date of the court's order; that the defendant be restrained from making, fixing or promulgating any other rates; third, that the court appoint a receiver to keep all monthly or cash revenues, and apply the same under the order of the court; fourth, for judgment in the sum of fourteen thousand three hundred dollars for violations of said statute in refusing to appoint commissioners; fifth, for general relief.

To this complaint, the defendant, James A. Murray, filed a demurrer (to be found on pp. 37, 38 and 39 of the printed record), setting forth the following grounds of demurrer:

First, that the court is without jurisdiction of the subject-matter of the bill of complaint, the same not presenting a cause for equitable cognizance; second, the complainant in and of its said bill has not made or stated such a cause as entitles it in a court of equity to any relief against the de-

fendant as to any matters set forth in the said bill; third, that the bill is multifarious because inconsistent causes of action are stated therein; fourth, that the bill is multifarious because of misjoinder of causes of action; to-wit, (a) a cause of action in favor of the plaintiff and against the defendant to recover a money judgment for a penalty under the Idaho statute; (b) a cause of action in equity to fix reasonable rates and charges; (c) a cause of action in equity for the appointment of a receiver.

Thereafter said cause was heard upon said demurrer, and on the 3rd day of May, 1909, the said Circuit Court of the United States announced its intention of sustaining the demurrer, and ordered the bill dismissed, which was accordingly done (see page 40 of the record). The opinion of DeHaven, district Judge, is set forth at page 41 of the printed record in this case. The court says, *inter alia*:

" \* \* \* in my opinion, the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the plaintiff to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The City of Pocatello, under its general power to provide the city with water, was authorized to contract with any person, or corporation, to furnish water for it and its inhabitants and Ordinance 86, under which the defendant is furnishing water to the complainant and

its citizens, constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and for that reason are not affected by a subsequent statute of Idaho of March 16th, 1897, amending section 2711 of the Revised Statutes of 1897 of the State of Idaho, referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because defendant desired 'to be protected against unreasonable and arbitrary charges for water and water service,' before undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation on the part of the City of Pocatello to pursue the mode pointed out in those sections in readjusting or changing the water rates named in the ordinance, an obligation which, under Article I, section 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections provide for adjusting and fixing the charges to be allowed the defendant for

water furnished by him under the ordinance cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant."

In addition to the foregoing ground for sustaining the demurrer, the court held that

"Even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the City of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges which the defendant shall have the right to collect during the next three years under his franchise."

That court further held that the fact that defendant had refused to concur in the naming of commissioners, under the statute, did not give to the court jurisdiction to fix the rates.

Thereafter, and on the 6th day of July, 1911, the mayor and City Council of Pocatello passed the following resolution:

"Be it resolved by the Mayor and City Council of the City, of Pocatello, Bannock County, Idaho, that the schedule of charges for water and water service both public and private, supplied and furnished to the City

of Pocatello and its inhabitants, by James A. Murray, doing business under the name and style of the Pocatello Water Company, as now in force, are not fair, equitable or reasonable to the City of Pocatello and its inhabitants, and that it is the right and duty of this body to have a commission appointed pursuant to the provisions of section 2839, Idaho Revised Codes, to fix and determine the rates to be charged for water and water service to the City of Pocatello, and its inhabitants by said James A. Murray:

Therefore, be it resolved that J. H. Townsend, and W. P. Havenor, tax payers of the City of Pocatello, Bannock County, Idaho, as Commissioner to act in conjunction with other commissioners to be appointed pursuant to the provisions of section 2839, Idaho Revised Codes, to fix and determine the rates to be charged for water and water service, both public and private, in the City of Pocatello, Bannock County, Idaho, as therein provided.

Be it further resolved that James A. Murray be given the notice required by said section 2839 of the appointment of said two commissioners as provided herein, and that demand be made upon him that he at once and within thirty days after said demand appoint a like number of commissioners to act in conjunction with those hereby appointed,

and pursuant to the provisions of said section 2839, Idaho Revised Codes.

Dated at Pocatello, Idaho, this 6th day of July, 1911.

J. M. BISTLINE,  
Mayor.

Attest:

FINN H. BERG,  
Clerk."

(P. 12 of the printed record.)

And on the same day issued to this plaintiff in error the following notice:

**"NOTICE.**

Pocatello, Idaho, July 6, 1911.

To James A. Murray, Pocatello Water Co.:

You are hereby notified that the City of Pocatello this day has appointed two commissioners to fix the rates to be charged for water in the City of Pocatello, Bannock County, Idaho, pursuant to the provisions of section 2839, Revised Codes of Idaho, the two commissioners appointed being J. H. Townsend and W. P. Havenor, and you are hereby called upon to appoint two commissioners to act for yourself and the Pocatello Water Company as provided in section 2839, Idaho Revised Codes. A copy of the resolu-

tion appointing said commissioners is hereto attached and made a part hereof.

J. M. BISTLINE,  
Mayor.

Attest:

FINN H. BERG,  
Clerk."

(P. 12 of the printed record.)

Thereafter, and on, to-wit, the 23rd day of September, 1911, the City of Pocatello filed its affidavit for writ of mandate in the Supreme Court of the State of Idaho (to be found on pp. 4-14, inclusive, of the printed record), reciting facts in substance as follows: That the defendant, James A. Murray, is doing business as The Pocatello Water Company, and is owning and operating a water plant to supply the City of Pocatello, and is assuming to act in accordance with the provisions of the said Ordinance 86; that the City Council did, on the 6th day of July, 1911, pass a resolution declaring the current rates charged by the defendant for such service to be unfair, inequitable and unreasonable, and directing the appointment of a commission pursuant to the provisions of section 2839 of the Revised Codes of Idaho of 1909, and appointing two taxpayers as commissioners to act on behalf of the city in conjunction with the other commissioners to be appointed as provided for in said ordinance; that the notice of such action of the City Council was served upon the defendant, James A. Murray, on the 15th day of July, 1911, and that he was asked to appoint two commissioners to act for



himself under the provisions of the said section, and that he has refused to appoint such commissioners, basing his refusal upon the provisions of said Ordinance 86. The prayer of the said affidavit for writ of mandate was that a writ of mandate issue forthwith out of the court commanding the defendant to appoint commissioners to act with the commissioners appointed by the plaintiff, as provided by section 2839 of the Revised Codes of the State of Idaho of 1909, to determine the rates to be charged for water to the City of Pocatello and its inhabitants, and for such other and further order as to the court might seem proper.

In response to said petition, the court issued an alternative writ of mandate, directed to said James A. Murray, to immediately appoint two commissioners to act with the commissioners appointed by the city under the provisions of section 2839, to fix and determine the rates to be charged for said water service, or show cause why the same was not done.

Thereupon the defendant, Murray, filed a demurrer to the said affidavit, and a motion to quash the same, and a detailed answer thereto, which said answer set forth all of the proceedings which have been hereinabove recited.

The city filed a demurrer to the defendant's answer, and thereafter, upon hearing, the said Supreme Court of the State of Idaho directed its peremptory writ of mandate to issue, and on January 18, 1912, filed its written opinion (to be found at pp. 53-71, inclusive, of the printed record). In said opinion it was held: First—

"The judgment and order of the Circuit Court of the United States in dismissing the bill in *City of Pocatello v. Murray* has no bearing on the present action and does not estop the city from maintaining this action."

(The opinion of the Circuit Court in the case of *City of Pocatello vs. Murray* is reported in 173 Fed., 382.)

Second, that the provisions of Ordinance 86, and particularly sections 3 and 4 thereof, are not impaired by the provisions of section 2839 of the Revised Codes of Idaho, and the ordinance of July 6, 1911, and, in so holding, it held, *inter alia*, that the method for valuing the plant prescribed by section 5 of Ordinance 86 is superseded by the provisions of section 2839 of the Revised Codes of Idaho; that the provision in section 3 of Ordinance 86, that 5 per cent net income on the valuation to be determined by the commission provided for in said ordinance, is not binding upon the municipality, and must yield to rates fixed by the commission to be appointed under said statute and ordinance of July 6, 1911.

Thereafter the court issued its peremptory writ of mandate, commanding the defendant to immediately appoint two commissioners to act, etc. To this peremptory writ the plaintiff in error sued out a writ of error to this, the Supreme Court of the United States. Thereupon the City of Pocatello filed its motion in this court to affirm the judgment of the Supreme Court of the State of Idaho in this cause.

## ARGUMENT.

The plaintiff in error invokes the jurisdiction of this court upon the several grounds set forth in the assignments of error, but, for the purpose of resisting this motion, he directs the court's attention especially to two grounds whereupon he predicates his claim that the rights and immunities guaranteed to him as a citizen of the United States by the Constitution and laws of the United States have been denied by the Legislature of the State of Idaho, the City Council of the City of Pocatello, and the Supreme Court of Idaho, to-wit:

First—That the obligation of the contract evidenced by said Ordinance 86 has been impaired in violation of the provisions of Article I, section 10, of the Federal Constitution, and that the plaintiff in error has been deprived of its property without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States.

Second—That the Supreme Court of the State of Idaho did not give full faith and credit to the final judgment of the Circuit Court of the United States for the District of Idaho, rendered in the case of the City of Pocatello against James A. Murray, etc., reported in 173 Fed., at page 382, in violation of Article IV, section 1, of the Constitution of the United States, and denied the title, right, privilege and immunity claimed by this plaintiff in error under the laws and authority of the United States.

*Impairment of the Obligations of Contract Contained  
in Ordinance No. 86.*

The fact that the district judge sitting in the Circuit Court of the United States for the District of Idaho filed a written opinion in the case wherein the plaintiff in error here was defendant, and the defendant in error here was plaintiff, wherein was considered the question whether the obligation of the contract in Ordinance No. 86 was impaired by section 2839 of the Idaho Revised Code, and subsequent legislative action of the city thereunder, in which opinion it was solemnly and judicially declared that the obligation of the contract in said Ordinance No. 86 was impaired by section 2839 of the Idaho Revised Code, establishes the good faith of the plaintiff in error in presenting that identical question for consideration by this court. The fact that the honorable district judge sitting in the Circuit Court of the United States for the district of Idaho, and the honorable the Supreme Court of the State of Idaho, have solemnly and officially expressed diametrically opposite views upon this question should acquit the plaintiff in error of the charge of bringing to this court a frivolous and unfounded constitutional question, predicated on that state of facts and law. So far as any cases have been cited in the brief filed in support of the pending motion, or referred to in the opinion of the Supreme Court of the State of Idaho, we find no cases in this court which have disposed of questions involving the impairment of the obligations of covenants, such as are contained in sections 3, 4 and 5 of Ordinance No. 86, by legislative acts such as section 2839 of Idaho Revised Code, under like or similar constitutional

provisions, or by decisions such as that filed in this case by the honorable Supreme Court of Idaho. Our own research fails to disclose any such authorities. Such a condition of affairs is the strongest inducement for this court to exercise its jurisdiction to authoritatively conclude the question.

Forsythe vs. Hammond, 166 U. S., 514.

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No language can express more clearly than was expressed in Ordinance 86 the intention of the *city* to induce James A. Murray to incur a great outlay for the purpose of increasing the water supply of that city and extending the water service, and to give him, as far as the city lawfully might, full, adequate and effective guaranties, in the form of covenants, against attempted confiscation of that investment. The water rates were fixed definitely and in detail for a period of five years from and after the date of the ordinance. That period has expired. It was contemplated that at the end of that time the city might desire to establish new rates, or might desire to purchase the property. It was contemplated that, in the event of the desire of the city to establish new rates, or purchase the property, there would be two main questions of fact liable to dispute between the parties: First, the value of the property at the time of such readjustment of the rates, or purchase; second, a minimum net income to the owner, which should be considered reasonable. Therefore, it was covenanted that at the expiration of five years

“if the earnings of said water system shall exceed five per cent (5%) above reasonable

expenses, upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'schedule of water rates' \* \* \* may be readjusted so as to yield not less than five per cent above reasonable expenses, on the valuation, but no readjustment shall hereafter be made that will yield less than five per cent above reasonable expenses on the value of the investment ascertained as hereinafter provided for in section 4.

Section 4. If at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section 3, and that said city of Pocatello and that said James A. Murray, or his successors or assigns, cannot agree upon the value of the said water system for the purposes of such readjustment, then the value of said water system shall be ascertained and determined in the following manner, to-wit:

A committee of four experienced and disinterested hydraulic engineers, who must be members of the American Society of Engineers, shall be selected, two by the city of Pocatello, and two by the said James A. Murray, or his successors or assigns, and the following question shall be submitted to them:

'For what sum can the water system of James A. Murray be now duplicated?'

If a majority of the four cannot agree, they shall select a fifth, and if they cannot agree upon the fifth, they shall request the President of the American Society of Civil Engineers to appoint the fifth. A majority of the committee so selected shall fix the value of the said water system for the purpose of readjusting said water rates, and such decision shall be final."

It is conceded by the defendant in error and by the Supreme Court of Idaho that the city had the power, both inherent and statutory, to enter into said contract, subject only to the power of the legislature to prescribe the manner in which maximum rates may be established.

Under the fourth subdivision of section 39 of the General Laws of the State of Idaho of 1899, page 196, above quoted, the City of Pocatello had the power

"4th. To make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water."

We are advised by this court, in the case of Home Telephone Co. vs. Los Angeles, 241 U. S., at 274:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through

their relation with other facts, turn the balance one way or the other."

If this court be of the opinion that, in the making of the covenants above quoted from Ordinance 86, it was intended to any extent to be an abdication by the municipality, and through it by the state, of any governmental power, we submit that the case at bar presents the strongest reasons in justice and equity for holding that, to the extent to which said covenants may be said to be an abdication of governmental power, the city had authority to make them. The power to "provide the city with water" carries with it the power to make reasonable contracts for that purpose.

At the time the contract, Ordinance 86, was entered into, the city needed an enlarged water plant. It is not conceivable that anyone could have been expected to advance the money necessary to meet the requirements of the city without some obligations on the part of the city. It was evidently understood by the parties that the city could not agree to permanent rates to extend during the entire period of the contract, but it was assumed that a party advancing money for that purpose was entitled to some guaranties. The city must have been authorized to enter into some obligations for the purpose of protecting the investments of the other party to the contract. It is difficult to conceive of any more reasonable or simple arrangements for that purpose than were made in this case. Certainly, if a city can neither agree to rates to last during the term of the contract, nor agree upon what test shall be used in valuing the



property, nor agree to a skilled and impartial board of appraisers for the purpose of valuing the property, and if it cannot agree upon what shall be considered a reasonable net return on such investment, it is difficult to see what substantial, permanent inducement it can hold out to a party willing to make an investment to meet the city's needs in a public service. There are strong reasons for holding that, under the powers which the city had at the time Ordinance 86 was entered into, it could, if necessary, surrender *pro tanto* its governmental powers for the purpose of giving some reasonable guaranty. This was the view of the Circuit Court of the United States for the District of Nevada, in 173 Fed., above quoted. But we may admit, *arguendo*, that the city had not authority to surrender its governmental powers *pro tanto* or *in toto*; and yet the covenants in ordinance 86 are a valid, enforceable contract, which could not thereafter be wiped out by the exercise of power to prescribe the manner in which reasonable rates shall be fixed.

It will be noted that nowhere in the ordinance is there a provision designating how or by whom the rates shall be fixed. Fairly understood, the provisions of the contract are that 5 per cent net on the investment shall be considered a fair return; that, if the city desires readjustment of the rates, it shall first attempt to agree with the owner upon the value of the plant; that if the parties cannot agree, the plant shall be valued by skilled engineers, to be selected in the manner provided, from the American Society of Civil Engineers (whose members are of the highest authority in the United States on such subjects), that the test of value shall be "the cost of reproduction

at the time of valuation;" and the finding of such board of appraisers shall be conclusive upon the parties.

At the time the contract, Ordinance No. 86, was entered into, it was not definitely known that the "going value" was a factor to be considered in fixing the value of a public-service property. It has since been established that "going value" is such a factor. (*Omaha vs. Omaha Water Co.*, 218 U. S., 202.) The test of "cost of reproduction" is not the only test which has been applied. It excludes some factors which would be favorable to the Water Company, and it may exclude some minor factors which would be favorable to the city. But no one can be a better judge than the parties to the contract as to what, among the various tests that may be applied, is the proper test under the facts and circumstances of the particular transaction which they are considering. The covenant shows that, in the judgment of the contracting parties, the "cost of reproduction," under the conditions existing and reasonably to be expected, would give the nearest approximation to an absolutely just value.

The contract shows upon its face the desire of the parties at the threshold of their relations to determine by which of the many conflicting tests value shall be determined, what shall be considered the lowest reasonable rate, and what minimum return the company may demand. The ordinance bears upon its face a *bona fide* effort to comply with the public policy of the state requiring public service at a reasonable rate. The contract does not prohibit the establishment of reasonable rates, nor does it attempt

to arbitrarily establish rates regardless of their reasonableness.

It is not unreasonable to provide that the question of the value of the plant, at any period when such value might be material, should be determined by a skilled board of appraisal. Such a board as is provided by the Ordinance 86 for the determination of the fact of value is better qualified even than a skilled master in chancery to reach a just and fair conclusion. Intricate and involved matters of technical knowledge predominate in such an inquiry—matters requiring skilled judgment and educated experience for their determination. A city can recognize the absolute fairness of such a method of determining material facts, just as well as it can be recognized by an individual, and consequently can contract for it. If today the rates had been fixed, and there were now pending, in some court having jurisdiction, a suit brought by the company to secure a judicial review of the rates, the city and the company could agree upon a statement of the facts to be considered by such court, or the city could agree that all evidences of value should be submitted to a board of appraisal, and that the findings of such board of appraisal should be conclusive upon the parties, and that the findings of such board should be submitted to such court in lieu of such a statement of facts. We can see no public policy which would prevent the city from making any such agreement, or any agreement such as private individuals might make under the same circumstances. If the city can so agree to the submission of such questions of fact, in such a judicial proceeding, it can so agree in a legislative proceeding for the fixing of rates. The conclusions of

such body are not final, but are subject to review. If it can agree pending such a proceeding, it can anticipate such a situation, and agree that such method of determining ultimate facts shall prevail when such a proceeding shall be had. The fixing of the value in the manner provided in Ordinance No. 86 calls to the aid of the city and company the very best obtainable skill in the determination of the troublesome questions of fact involved, and the results of the deliberations of such a board ought to be welcomed by any officer or body of men having the duty to treat and consider any subject-matter having for its most important element such questions of value. We submit that the provision of the ordinance providing a means of valuing the property in question is reasonable, wise, prudent, highly desirable, and binding upon the city.

The covenant that 5 per cent net is fixed and determined to be a reasonable rate of income upon the value of the property is the result of a *bona fide* effort of the parties to anticipate the difficult question, "What is a reasonable net income upon property of a fixed valuation, considering the intricate and variable factors always necessary to be determined?" It cannot be said that 5 per cent net is in excess of the amount customarily considered by the courts to be a reasonable rate of income on public-service contracts.

In many cases it has been decided that a net income of 8 per cent was a fair and reasonable return on the investment. It is covenanted in the ordinance that the rates fixed therein for a period of five years shall not be changed until a valuation is had, and it is found that the going rates yield a net income of

more than 5 per cent. The validity of these covenants is here involved because, under the mandate of the Supreme Court of Idaho, the company must now proceed with the rate-fixing operation prescribed by section 2839, notwithstanding the fact that the city has covenanted that it will not require the company to enter into such a proceeding until it shall have appeared in the proper way that the company is making more than 5 per cent net on the proper valuation of its property. In so enforcing the ordinance of July 6, 1911 (printed on page 10 of the record), passed by the city under the authority of section 2839, the Supreme Court, by its *decision*, which would bind us as *res adjudicata*, if not reversed or modified, whether beyond the necessities of the case or not, holds that the covenant as to method of fixing value, and the covenant as to reasonable return on the value so fixed, are no longer of force and effect.

The going rates were declared to be reasonable in the contract. Obviously, other rates might also be reasonable. The parties knowing the facts surrounding the origin of the transaction, understanding the mutual motives prompting the arrangement, and having an opinion concerning the development of the enterprise in the future, concluded that rates yielding 5 per cent net should be considered reasonable, and that rates yielding less should be considered unreasonable. Obviously, if the covenant providing for a board of appraisal and the covenant concerning a 5 per cent rate are valid, and the city is estopped from claiming that rates yielding less than 5 per cent are reasonable, then it is an idle thing to require the company to go to the expense of a rate-fixing proceeding under

the provisions of section 2839, until it is determined, as provided in Ordinance 86, that the time for change of rates has arrived. If the covenants as to valuations and minimum rates are valid, *good sense* and *good policy* justify the agreement of the city that it will not proceed to readjust the rates and put the company and the city to the expense of such a proceeding so long as the rates are reasonable, tested by the terms of the ordinance, and its covenant not to do so is valid. It is infinitely better to find out first whether the rates are subject to change under the covenants of the parties, before the attempt is made to change them, because, after the commission provided by section 2839 shall have fixed the rates at great expense to the parties, if the parties should then proceed, under the provisions of the ordinance, to value the property, such valuation might necessitate the setting aside of the entire rate-fixing proceedings. On the other hand, if the valuation under the ordinance is first made, the acts of the rate-fixing commission will be more likely to be fair, reasonable and permanent.

The fixing of a rate or charge for public-service corporations is a legislative act. But no legislative officer, or body, has the jurisdiction to conclusively *determine* the value of the plant. There is no limit upon the rate that may be fixed, short of a confiscatory rate. If a company whose rates have been fixed, believes such rates to be confiscatory, such company may appeal to a court of equity for protection. Then, for the first time, are the parties before a tribunal which has power to *conclusively determine the value of the plant, and the reasonableness of the rates fixed*. Both questions may then, for the first time, be conclusively determined, as between the parties, by the

courts. Both questions—as to the value of the property and the reasonableness of the rates—are, in the first instance, *questions of fact*. Any covenant between the parties which has for its object the conclusive determination of the question, “What is the value of the plant?” or the question, “What is a reasonable return on the value of the plant?” cannot be an infringement on the jurisdiction of either the rate-fixing body that may be created under the present order of things (assuming it has power to determine values), or a court that may review the rates. Legislators may act upon any information given them, or any policy conceived by them. Courts act upon matters of common knowledge, and evidence which the parties choose to present to them, and the law applicable to such state of facts. Private individuals may, by covenant, provide means for fixing the values of the subject-matter of their contracts; provide what shall be considered a reasonable, and what an unreasonable, return on an investment made thereunder; and such covenants are incidents of ordinary business transactions. The parties thereto are by such covenants estopped from contending that the facts therein established by covenant are to the contrary thereof, or that the method of establishing such facts should not be observed, unless there as an element of fraud or other element invalidating such covenants. When a city enters into such covenants as are contained in Ordinance 86, it likewise is exercising its business and proprietary powers as distinguished from its legislative powers.

**Pike's Peak Power Co. vs. Colorado Springs**, 105 Fed., 1, and cases therein collected.

When a body authorized by law to hold a legislative inquiry for the purpose of determining the rate charges for public service takes jurisdiction to make such determination, it is a tribunal, and the parties to the rates are parties to the controversy before it for determination. There is no high policy or reason why the parties to such legislative inquiry should not be estopped and precluded as to any material matter by covenants as to facts and the methods of establishing facts, in the same manner that they would be estopped or precluded in a court of law. The fact that the reasonableness of the rates can subsequently be the subject of judicial inquiry, wherein the parties can be so estopped, would be the most cogent reason why the rights of the parties should be no different in the case of legislative inquiry preceding the judicial review. The rate-fixing body hears the parties for its enlightenment, but it makes no conclusions except the ultimate conclusion fixing the rates. However, it would be idle to allow a rate-fixing body to proceed upon one basis of fact, when, upon judicial review, the parties would be held by their covenants to a different basis of facts.

In *Reagan vs. Farmers' Loan & Trust Company*, 154 U. S., 401, the allegation that a rate was unreasonable being admitted, by demurrer, was treated as an allegation of fact admitted by demurrer.

In *Cedar Rapids G. L. Co. vs. Cedar Rapids*, 144 Iowa, 426; 120 N. W., 966, at 973, it was held that the



question of what is a reasonable rate is a question of fact.

In the case of *Wilcox vs. Consolidated Gas Co.*, 212 U. S., at 47, this court held that the state was, by its acts, estopped from denying the value of certain franchises involved in the inquiry. If the question of value were more than a question of fact, material to the determination of the ultimate question of confiscation or fairness of rates, neither party could be estopped. If parties can be estopped by their acts, they can be estopped by covenants and agreements made with respect to the same subject-matter.

In *Prout vs. Starr*, 188 U. S., 537, the plaintiff brought a bill to enjoin the defendants from acting as a rate-fixing body and fixing certain railroad rates. The parties agreed to dispense with the taking of certain evidence, to accept the evidence taken in certain other cases, and to abide by the decrees therein to be entered. Such a procedure was approved.

There can be no question but what the parties of any judicial proceeding may estop themselves as to the facts by a solemn agreement, stipulation or statement of facts. (See *Blankinship vs. Oklahoma Water & Land Company*, 43 Pac., 1088.)

In 11 *Columbia Law Review* (No. 6), pages 537 and 538, Mr. Edward C. Bailly, in an article on "Legal Basis of Rate Regulation," says:

"Under the circumstances of the particular case, one or the other of the above items may be given controlling weight in the determination of the present value, *or may be*

*agreed upon by the parties as the proper text.*" (Italics ours.)

We do not presume to make the last citation as an authoritative statement of the law, but it is a statement of a law-writer, who is shown by his article to be a thorough and disinterested investigator of the question treated by him.

In *City of Des Moines vs. Welsbach Street Lighting Co.*, 188 Fed., 906, the Circuit Court of Appeals of the Eighth Circuit says:

"In respect to its business powers, a municipality is subject to the same application of the doctrine of estoppel as an individual or private corporation. *Ills. Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271."

We submit, therefore, that the covenants contained in sections 3, 4 and 5 of Ordinance 86 are valid covenants, intended to provide ways and means for the determination of certain questions of fact material to be considered by any tribunal fixing or reviewing the rates to be established.

The Supreme Court of Idaho, in the case now under discussion, reaches its decision, first, that, by virtue of the provisions of section 2839, the city is absolved from the obligation contained in Ordinance 86 to join the company in the determination of value, before entering into rate-fixing proceedings; second, that the city is no longer bound to observe the obligations of sections 3, 4 and 5 of Ordinance 86, because the method of valuation of the property in the ordi-

nance provided is superseded by the manner of fixing rates prescribed by the statute, section 2839. Third, the Supreme Court of Idaho justifies its action in disregarding the covenants of sections 3, 4 and 5 of Ordinance 86, because at the time of its passage there was a constitutional provision (sec. 6, Art. XV, of the Constitution of Idaho) to the effect that "The legislature shall provide by law the manner in which reasonable maximum rates shall be established," etc.

This later provision could be read into Ordinance 86 and not be inconsistent with any provision thereof. Some authorized legislative body must fix the rates, but the case presented to that body must be the case made by the parties under the ordinance. The company cannot, under the terms of the ordinance, prevent the fixing of rates, or dictate the manner in which rates shall be fixed; but it may call upon the city to *make the case* to be presented to the rate-fixing power, by *agreement as to value*, or by *appraisal of it*, and it has the right to insist that it be not put to the expense of the organization of a rate commission, until the city has fulfilled its obligation under the ordinance, and the necessity for a rate commission is determined, and the case is ready for it. Such provisions are not inconsistent with, but are in aid of, the rate-making powers. After such a case is made, the rate-making power has many functions to perform not in any wise dictated by the covenants.

The reservation of the power to prescribe the *manner* of fixing rates ought to be construed to be consistent with the other terms of the ordinance, and unless the reserved power to "prescribe the manner of fixing rates" is necessarily in conflict with the other

provisions of the ordinance, it ought not to be held to justify the annulment of such other provisions.

Before a reserved power can justify the abrogation of an express grant from the same authority, it must clearly appear that the exercise of the reserved power will necessarily conflict with the grant. In this case the power is fully satisfied by the grant of authority for the creation of a rate commission with power to pass upon the case made by the parties. The case of *Jack vs. Village of Grangeville*, 9 Idaho, 291, goes no further. The cases cited on the point by the Supreme Court of Idaho in its opinion, and by counsel at page 16 of their brief in support of this motion, of which *Cordwal vs. American Bridge Co.*, 113 U. S., 205, and *L. & N. R. Co. vs. Motley*, 219 U. S., 31, are types, bear but remotely upon the question. The Congress of the United States is not affected by the constitutional provision that it shall pass no laws impairing the obligation of contracts. Furthermore, the power of the national government to legislate concerning a subject-matter over which it has full legislative authority cannot be embarrassed or defeated by the acts of a state or an individual, even though such acts be lawful at the time performed. But if a sovereignty, having the plenary powers of legislation, exercises some part of that power, by way of authorizing some one of its governmental agencies to assume valid obligations, it ought not to be permitted to exercise its reserve powers to the destruction of such obligations, except where the exercise of such reserve power is necessarily destructive of such obligation. No authority, governmental or otherwise, should be permitted by its own reserve power to destroy its own obligations fur-

ther than the exercise of that reserve power *necessarily* destroys such obligations, and parties contracting with reference to such reserve powers (or, perhaps better, unexecuted powers) should not be held to an understanding and an assent that such reserve powers might be used *to destroy any obligations not necessarily within the scope of such powers*. In the case of *Wolf vs. New Orleans*, 103 U. S., 358, the city of New Orleans attempted to deprive itself of the ability to pay a legal obligation by foregoing its power of taxation. In that case it was not and could not be disputed that the city could exercise its governmental powers as it saw fit, but it was not allowed to exercise those governmental powers in a manner to impair the obligation of a contract theretofore entered into by virtue of other powers. The court held:

"However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

The powers of the state legislature are plenary, but it ought not to be, and is not, permitted to revel in the plenitude of its power. Even though the City of Pocatello may not have had authority to abdicate the governmental powers of the state, what it has done was done under the authority of the legislature, and ought not to be held in conflict with the powers not exercised in the incurring of the obligation, unless such reserve powers cannot be made effective without such a conflict.

Applying the foregoing principle to this case, we find that the reserve power has been exercised by the authorization of a rate commission to be created, *inter alia*, in the municipality of Pocatello to perform functions, the performance of which were not provided for in the ordinance, and the performance of which is not inconsistent with the ordinance; and whether it be said that the power to prescribe the *manner* of fixing rates means power to appoint a commission or not (and that is all that section 2839 covers), it cannot be said that power to prescribe the manner of fixing rates includes the power to supersede methods agreed upon by the parties as proper for determining the facts which the interested parties may desire to use as a basis for their contention before the body authorized to fix rates. The reserve power can be satisfied without the destruction of the covenants contained in sections 3, 4 and 5 of Ordinance 86; and yet the city by its ordinance of July 6, 1911, passed for the purpose of putting into effect section 2839, ignores its covenants, and attempts to justify its action by the assertion that it is merely exercising such reserve power.

Before the Supreme Court of the State of Idaho this plaintiff in error contended that section 2839 further impaired the obligation of his contract, because the commissioners to be appointed under that section *must* be taxpayers of the city, and even those which the plaintiff in error is graciously permitted to select must be taxpayers of the city, and that such a commission could not be a fair, impartial and unprejudiced tribunal. The Supreme Court of Idaho answered this contention by quoting from the case of

Home Tel. & Tel. Co. vs. Los Angeles, *supra*, the following language:

"The appellant further insists that the City Council is not an impartial tribunal because in effect, it is a judge in its own case. It is too late, however, after the many decisions of this court, which have either decided or recognized that the governing body of the city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition."

There is a good reason why the *city council or governing body* of a city may be given such power, because, theoretically at least, they are elective officers representing the public—the lawful protectors of the health, safety *and property* within the municipality. Theoretically at least, they are no more in duty bound to the taxpayers than they are to the public-service company. Although the city council makes the contract with the water company, that contract is made for the benefit of the citizens and property-owners as the real parties in interest. There is no reason, theoretically or otherwise, why any particular taxpayers or citizens of the municipality should be charged with the protection of the property of any others. Their relations to the public-service company are necessarily hostile. To entrust the fixing of the rates under the contract to the tender mercies of the taxpayer is, both in theory and in fact, entrusting to the real parties in interest on one side of the contract the power to dictate to the real party in interest on the other side of the contract what shall be allowed for the use of his property, and puts

in the hands of those truly hostile and adversely interested to the water company the power to impair and embarrass their own obligations to the other party to the contract in the person of the owner of the public-service property.

All the foregoing questions are now before this court for determination, and this court possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired.

Columbia W. R. Co. vs. Columbia, 172 U. S., 475.

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*Has the Federal Question Involved in This Writ of Error Been so Often Decided that it is No Longer a Substantial Question in This Court?*

Counsel for the city assert that the federal questions involved on this writ of error are frivolous and unsubstantial, because they have been so often decided by this court that there is no longer room for reasonable contention. Of course, this observation does not apply to the federal question presented by the failure of the Supreme Court of the State of Idaho to recognize the effect of the judgment in the Circuit Court of the United States for the District of Idaho. Counsel's observation is intended to apply solely to our contentions based on the impairment of the obligations of the ordinance, and the taking of our property without due process of law.

We have suggested to the court the question whether, at the time of making a contract between a public-service corporation and a city, the parties may agree that whenever it may become material to deter-



mine the value of the property devoted to public service, a certain test of value shall be applied as of the time when such value becomes material, and that a certain rate of income thereon shall be reasonable, and that a less rate shall be unreasonable—whether such an agreement is valid, whether the reservation of the power to prescribe the manner of fixing rates justifies legislative or judicial action annulling such covenant, and whether such covenant does not present a lawful and practical solution of a great many of the public-service rate troubles.

We find nothing in the decisions of this court which is conclusive upon the questions we present. Counsel for the city cites Tampa Waterworks Co. vs. Tampa, 199 U. S., 241; Home T. & T. Co. vs. Los Angeles, 211 U. S., 265; L. & N. R. Co. vs. Motley, 219 U. S., 465.

In the Tampa case permanent *rates* were fixed by the ordinance, and they were to stand as fixed during the life of the ordinance. The power to *regulate* the *rates* could *not* be exercised in that case without *necessarily* impairing the fixed rates. In the case at bar we need make no such contention, but say that certain covenants, relating to valuation of the property and reasonableness of the rates, are valid and must be observed by the city as a condition of the fixing of the rates. We might concede, *arguendo*, that the city has not the power to abdicate the *rate-making power*, because under our theory of the case it did not attempt to do so.

Likewise in the Home Telephone case the conflict was between permanent rates established by the ordinance, on one hand, and the rate-making power

of the city on the other, and it was held that under the facts of that case the city had not abdicated its governmental function.

In the Motley case there was no question of the right of Congress to pass laws impairing the obligation of contracts. The question was whether an exception could be read into the statute declaring certain transactions invalid, in favor of contracts consummated prior to the passage of the law. No one representing the United States, or representing it in the exercise of any of its governmental functions, had entered into any relations creating any obligation. In our case we contend that the original ordinance was entered into by the City of Pocatello by virtue of a statute of the State of Idaho, which was an exercise of the powers delegated to it by the State of Idaho, and that the State of Idaho should not be allowed to undermine its own obligations, except in so far as it is necessary to the exercise of its further powers.

We do not understand that any of the cases called to the court's attention in support of this motion have considered the legality, propriety or advisability of attempts by municipalities and public-service corporations to anticipate the necessity of at some time determining the value of property in use, and the reasonable rate thereon, and providing for the determination of such questions by some method preliminary to the submission of all data to the rate-making body. It has been suggested by some of the courts that

“the fixing of compensation for public service should be exercised with a keen sense of

justice on the part of the regulating party. The company should aid therein by a full and frank disclosure of its affairs. When so approached on either side, it would seem that rates might be settled, which, upon the one hand, would not dampen the zeal to furnish **the best service and extend the plant** as the needs of the advancing municipality shall require, nor, on the other hand, extract from **the people more than fair compensation** for the service received."

It cannot be denied that, from the standpoint of the public-service company, it appears highly unfair that rates should be established by public bodies upon which such public-service companies have practically no representation. It must be appreciated that often such municipal commissions are composed of men totally and utterly unable to comprehend the intricate facts and circumstances which ordinarily enter into the valuation of a public-service property, and that their judgments are more often based on prejudice than upon comprehension and deliberation. Naturally, public-service companies feel that such commissions are hostile, and it is not in human nature to meet such conditions with full frankness and confidence. On the other hand, the method provided for the valuation of the property in Ordinance 86 ought to be acceptable to all parties, ought to result in better valuations, and more ready acceptance of such valuations, and forestall a multitude of judicial proceedings which now seem to follow as a matter of

course from the conclusions reached by such rate-fixing bodies.

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*RES ADJUDICATA.*

The Supreme Court of the State of Idaho refused to sustain a plea of *res adjudicata*, based on a judgment of the Circuit Court of the United States for the District of Idaho.

Such refusal presents a federal question, both under the "full faith and credit" clause of the Constitution, and under section 709 of the Revised Statutes, referring to denial of a right, privilege or immunity claimed under the authority of the United States. In *Phoenix Insurance Co. vs. Tennessee*, 161 U. S., at 185, the court said:

"If a state court erroneously refuse to give such weight and effect to a judgment of one of the courts of the United States, a federal question arises which is within the jurisdiction of this court to review on writ of error to the Supreme Court of the State. *Crescent City Live Stock Co. v. Butchers' Union, etc.*, 120 U. S., 141. Although no higher sanctity or effect can be claimed for a judgment of a federal court than is due under the same circumstances to the judgment of a state court and in like cases (*Dupasser v. Rochereau*, 21 Wall., 130, 135; *Embry v. Palmer*, 107 U. S., 3) yet in the case of a judgment of the former court, the constitution provides that full faith and credit shall be given it, and whether it has or has

not been given by the state court is a federal question; while if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that judgment is not subject to review by this court, because it constitutes no federal question."

See, also, *Dowell vs. Applegate*,  
152 U. S., 327.

It may be noted that the Supreme Court of the State of Idaho confessed that it had not given the same faith and credit to the judgment of the federal court that it would have given to a judgment of the state court. It made a distinction based upon its construction of the jurisdiction of the federal court and put an interpretation upon the judicial acts of the federal court and denied the jurisdiction of the federal court, thereby construing the laws of the United States under which said court was acting. It may also be noted that the decision of the federal court upon which the plea of *res judicata* was based was the decision of a federal question; to-wit, whether Ordinance 86 would be impaired by the recognition of the validity of section 2839.

In order to apply the rule of *res adjudicata*, it must be known what was decided. That which was necessarily decided, and that which, though not necessarily decided, was in *fact* decided, is *res adjudicata*. The rule is clearly stated by Justice Miller in

the dissenting opinion in *Aurora City vs. West*, 7 Wall., 82 at 106, in the following language:

"That rule is, that when a former judgment is relied upon, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear from extrinsic proof that it was in fact decided. This is expressly ruled no less than three times in the last eight years by this court, to-wit, in *Steam Packet Co. v. Sickles*, 24 How. 333; *Same v. Same*, 5 Wall., 580; *Miles v. Caldwell*, 2 Wall. 35."

The only difference between Justice Miller and his colleagues in the majority in that case was that they ruled, and the case holds, for a broader doctrine—to-wit, that whatever *might* have been decided, although not necessarily, or, in fact, decided, is concluded by the judgment.

To find out what was in fact decided, we may properly resort to an inspection of the opinion. In *Dowell vs. Applegate*, *supra*, this court examined the opinion of Judge Deady, rendered upon a demurrer in a former case in his court, and determined therefrom what questions were decided by him. (See p. 337.) And in *Baker vs. Cummings*, 181 U. S., 117, this court examined the opinion rendered on a demurrer to a bill in equity at the time an order was entered dismissing such bill, for the purpose of determining whether the bill was dismissed on the merits. An inspection of the opinion of Judge De Haven, reported in 173 Fed., at 382, excerpts from which are quoted *supra*, shows conclusively that he did in fact

decide that section 2839 impaired the obligation of contract in Ordinance 86. For convenience, we here quote again his views expressed upon that question:

"\* \* \* in my opinion the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the plaintiff to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The City of Pocatello, under its general power to provide the city with water, was authorized to contract with any person, or corporation, to furnish water for it and its inhabitants, and Ordinance 86, under which the defendant is furnishing water to the complainant and its citizens, constitutes a valid contract between the complainant and the defendant. Sections 3 and 4 of that Ordinance are a substantial part of that contract, and for that reason are not affected by a subsequent statute of Idaho of March 16, 1907, amending section 2711 of the Revised Statutes of 1887 of the State of Idaho, referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because the defendant desired 'to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service' before

undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation on the part of the city of Pocatello to pursue the mode pointed out in these sections in readjusting or changing the water rates named in the ordinance; an obligation which, under article 1, sec. 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections prescribe for adjusting and fixing the charges to be allowed the defendant for water furnished by him, under the ordinance, cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant."

It is true that Judge De Haven fortified his opinion by stating a further ground why the bill should be dismissed. Either of the grounds was sufficient to sustain the dismissal.

Therefore, neither was *obiter*.

Ontario Land Co. vs. Wilfong, 223 U. S.,  
344.

U. P. R. R. Co. vs. M. C. & C. R. Co., 222  
U. S., 207.

The bill of complaint in the case before Judge De Haven which is epitomized in our statement of facts, stated a ground of equitable cognizance. If the



court had decided that the statute, section 2839, was valid and controlled the rights of the parties, irrespective of Ordinance 86, it could in its discretion have appointed a receiver, as prayed in the bill, and given such other incidental relief as in its discretion was proper. Such action might, or might not, have been erroneous. It is not necessary to find that the Circuit Court for the District of Idaho had jurisdiction in that cause to fix the rates as between the parties, in order to find that it had cognizance of the case.

The City of Pocatello cannot be heard to say that that court had not cognizance of the case, or that it had not equitable jurisdiction; for it was the plaintiff in the case who filed the bill, and invoked the equitable jurisdiction of the court. In the case of *Forsythe vs. Hammond*, 166 U. S., 506, one of the parties had brought an action in the Supreme Court of the State of Indiana, which had for its object the determination of some questions affecting the boundaries of a municipal corporation. The State Supreme Court took jurisdiction and decided adversely to the moving party. Thereafter, the defending party in the proceeding in the State Supreme Court was made a defendant by the same moving party in an action in the Circuit Court of the United States for the District of Indiana, and the defending party therein set up the decision in his favor made in the judicial proceedings had in the Supreme Court of Indiana. The plaintiff in the federal court (being the same party who was plaintiff in the state court) insisted that the decision of the Supreme Court of the state was not *res judicata*, because the matter before it was solely of legis-

lative cognizance, and not judicial in its nature, and therefore beyond the jurisdiction of the Supreme Court of Indiana. To that contention this court answered (pp. 516, 517 and 518) :

“But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision. \* \* \* Were or were not these proceedings valid, and was or was not such a decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question is certainly one of a judicial nature. Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme

Court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

It would be difficult to find a case more clearly in point, and involving more of the questions involved in the case at bar.

Having jurisdiction of the parties, the court denied any relief prayed for in the bill. It might be admitted that the court could have dismissed the bill for any reason within its discretion without deciding whether Ordinance No. 86 was impaired by the act of the legislature, section 2839, and the subsequent ordinances of the City Council passed by virtue of the authority thereof; *but it did not do so*. It decided that section 2839 was not enforceable as against the provisions of Ordinance 86; and that decision became the law of the case as between the parties—*res judicata*. By that decision the plaintiff in error became better assured of his right, and confirmed therein. He had the added security of the decision of the federal court in the case between the identical parties in a matter involving the identical facts and the identical question of law. A judgment of dismissal on demurrer, with no limitations placed thereon, is a judgment on the merits.

Durant vs. Essex Co., 7 Wall., 107.

Forsythe vs. City of Hammond, 166 U. S.,  
506.

Baker vs. Cummings, 181 U. S., at 125.

In the latter case it was said:

“The proceedings, however, which were thus directed to be taken, were simply to reverse the judgment of the lower court, and to dismiss the bill. It was not a conditional dismissal, without prejudice, or words to

that effect, but a general one. A dismissal of the bill under such directions is presumed to be on the merits unless it be otherwise stated in the decree of dismissal."

Nor is it material that the judgment of dismissal was entered on demurrer.

*Aurora City vs. West, supra.*

It cannot be presumed that a general decree of dismissal is not upon the merits; for the proper entry in case of dismissal without a consideration of the merits is a dismissal "without prejudice," and if the trial court refuse to so qualify the dismissal, the decree of dismissal is appealable, and will be corrected on appeal.

*Swan Land & C. Co. vs. Frank, 148 U. S., at 612.*

It is true that a court cannot without jurisdiction make any binding decision. But there is a difference between jurisdiction of the parties and subject-matter, and equitable jurisdiction. A court of equity, having jurisdiction of the parties and subject-matter, has jurisdiction to decide any question that it may think material to its own equitable jurisdiction, and anything it so decides is the law of the case, even though the decision of such a question results in the dismissal of the bill for want of grounds for equitable relief.

In *Dowell vs. Applegate, supra*, this court said, at page 337:

"If the federal court erred in assuming or retaining jurisdiction of Dowell's suit—a

question not necessary to be examined—would it follow that its final decree being unmodified and enforced can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered? \* \* \* These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive on the parties before it, and could not be questioned by them, or either of them collaterally, or otherwise, than on writ of error, or appeal to this court.”

Had the Supreme Court of Idaho given to the decree of the Circuit Court of the United States for the District of Idaho the faith and credit, force and effect, to which it was entitled under the laws and Constitution of the United States, it could not have consistently issued its writ of mandate. To do so ignores, violates and impairs the covenant contained in Ordinance 86, that no adjustment of rates shall be had until after a valuation has been made in accord-

ance with the covenants of the ordinance, and the judgment of the Supreme Court of Idaho should have been to dismiss the petition for said writ of mandate.

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### CONCLUSION.

We ask that the motion to affirm be denied. If such be the ruling of this court on the motion to affirm, we will give further investigation to some of the questions which we present for the court's consideration in this brief, and support our argument with a fuller citation of authorities, direct and analogous. We respectfully submit that enough has been said in this brief to show that the federal questions presented, both as to the impairment of the covenants in Ordinance 86 by the act of the legislature, the ordinance of the municipality, and the decision of the Supreme Court of Idaho putting the same into effect and construing the same, are substantial, important, as yet undetermined by this court, and worthy of a full hearing and consideration; and that the federal question presented by the denial of our plea of *res judicata*, in the Supreme Court of Idaho, is not only not subject to the criticism which is made upon it, as the basis of the motion to affirm, but that, upon the decisions already rendered by this court, the assignment of error directed to that part of the action of the Supreme Court of Idaho is well taken.

We ask that the motion to affirm be denied, and  
that this writ of error be heard upon the merits.

Respectfully submitted,

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CLAYTON C. DORSEY,  
WILLIAM V. HODGES.

Attorneys for Plaintiff in Error.

A. A. HOEHLING, JR.,

N. M. RUTCK,

Of Counsel.





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FILED.

MAY 6 1912

JAMES H. McKENNE  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~1010~~. 575

JAMES A. MURRAY, DOING BUSINESS AS THE  
POCATELLO WATER COMPANY, PLAIN-  
TIF IN ERROR,

vs.

THE CITY OF POCATELLO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
IDAHO.

MOTION TO AFFIRM AND SUPPORTING BRIEF.

ALDIS B. BROWNE,  
ALEXANDER BRITTON,  
EVANS BROWNE,  
*Attorneys for Defendant in Error.*



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

**No. 1015.**

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JAMES A. MURRAY, DOING BUSINESS AS THE  
POCATELLO WATER COMPANY, PLAINTIFF IN ERROR,

VS.

THE CITY OF POCATELLO.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
IDAHO.

---

**MOTION TO AFFIRM AND SUPPORTING BRIEF.**

Now comes the defendant in error, by its counsel, and moves this honorable court that the judgment of the Supreme Court of Idaho in the above-entitled cause be here affirmed under Rule 6, paragraph 5.

ALDIS B. BROWNE,  
ALEXANDER BRITTON,  
EVANS BROWNE,  
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IN THE SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1911  
No. 1015

JAMES A. MURRAY, DOING BUSINESS AS THE  
POCATELLO WATER COMPANY,  
PLAINTIFF IN ERROR  
VS.  
THE CITY OF POCATELLO.

STATEMENT.

The plaintiff in error is the owner of the water works which supplies the City of Pocatello, and seeks review of the action of the Supreme Court of Idaho granting writ of mandate upon petition of the City requiring him to join with the City in appointing two commissioners to act with like number theretofore appointed by the City, as provided by the law of the State, in readjusting the rates charged consumers of water, and following his refusal upon proper notice and demand from the City so to do.

The case stands upon the pleadings, being (1) the petition, (2) answer and demurrer of defendant thereto, and (3) demurrer of the City to such answer. The action of the City is based upon:

*First.* Section 2, Article 15 of the State Constitution, which provides as follows:

“The right to collect rates for compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by the authority of and in the manner prescribed by law.”

*Second.* Section 6 of the same Article 15 of the State Constitution, which provides as follows:

“The Legislature shall provide by law the manner in which reasonable maximum rates shall be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose.”

*Third.* The provisions of the act of March 16, 1907, amending Section 2711 of the Revised Statutes of Idaho of 1887, which as amended is now Section 2839 of the Revised Code of Idaho, and provides as follows:

“Sec. 2839. All persons, companies, or corporations, supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water, may, from time to time, establish and at such rates as established in the manner hereinafter specified; and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified.

“The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the town or city authorities, or when there are no town or city authorities, then by the board of county

commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; said town or city authorities must, within ten days after the appointment of the two commissioners so selected, give notice in writing to said person, company, or corporation supplying water, of the appointment of such commissioners, and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or city, must be selected by the person, company, or corporation supplying water, and in case a majority of the four commissioners so selected cannot agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or city, and if they cannot agree upon a fifth commissioner, then the probate judge of the county, must, within ten days after notice to him by said commissioners, that they are unable to agree upon a fifth commissioner, select a fifth commissioner qualified as aforesaid. The decision of a majority of the commissioners so selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days from the date such board of water commissioners is complete: Provided, That any person, company, or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, That nothing in this section contained shall relieve said town or city authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a



franchise to any person, company, or corporation to supply water as aforesaid: Provided, further, That said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one half of said sum to be paid by the town or city, and one half by such person, company, or corporation supplying water: Provided, further, That said commissioners shall be empowered to incur any other expense that may be necessary to aid them in establishing such water rates, and one half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

The defendant (plaintiff in error) pleads in substance:

1. That by an ordinance passed by the mayor and council of the City and approved June 6, 1901, certain schedule of rates therein set forth was agreed upon to continue for a period of five years, at the expiration of which time, if the earnings of the water system should then exceed five per cent. above reasonable expenses upon the value thereof, as then agreed upon or ascertained in the manner prescribed by the ordinance, then the rates set forth in Section two thereof should be readjusted so as to yield not less than five per cent. above reasonable expenses on such valuation; that if the City and Murray, or his successors, could not agree upon the value of the water system for the purpose of readjusting such schedule of rates, then the City and Murray should each select two experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, to whom the following question shall be submitted: "For

what sum can the water system of James A. Murray be now duplicated?" And if a majority of the four do not agree, they should select a fifth, or failing to agree upon such fifth member they should request the President of the American Society of Civil Engineers to appoint a fifth member. Whereupon, "The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting the said rates, and such decision shall be final." The ordinance further provided that the City should not thereafter grant to others any terms or franchises for the construction or operation of a water system, more favorable than those thereby held, confirmed, and continued in Murray, nor should the City build or acquire a water system of its own until it had first offered to purchase the water system of Murray, either at an agreed price, or at a valuation to be ascertained in the same manner as provided in determining the value of the plant of the water system, for the purpose of determining the schedule of rates. This ordinance is set forth in the record (pp. 6-11). Based thereon the plaintiff in error pleads (R. 26) that Section 2839 of the Revised Codes of Idaho of 1909 would, as applied to him, result in the impairment of his contract with the City, and thus contravene Article I, Section 10, of the Federal Constitution, as well as the Fourteenth Amendment to that instrument, providing that no person shall be deprived of property without due process of law. This is the prime Federal question raised by the plaintiff in error, two other defenses being submitted: (1) *res adjudicata*, and (2) another

action pending. Or to adopt the concise language of the opinion of the Supreme Court of Idaho herein (R. 56):

"The answer raises three principal questions of law which must be determined. First, it sets up Ordinance No. 86 of the city of Pocatello, and alleges that the defendant, relying upon the provisions of that ordinance as a contract, invested his money in extending his water works and system and that he is not subject to the provisions of the statute, Sec. 2839, for the reason that the statute was passed subsequent to the passage of Ordinance No. 86 and has the effect of impairing the contract and depriving him of his property without due process of law. Second, he pleads *res adjudicata*, in that he claims the same questions here raised have been adjudicated in the case of *City of Pocatello v. Murray*, 173 Fed., 382, by the circuit court of the United States for the district of Idaho; and, third, he pleads another action pending."

In a well considered opinion, the Court below proceeds to consider and determine adversely to plaintiff in error each of these several grounds of defense. The assignments of error (R. 77-80) are addressed to the two defenses first stated. The ruling of the Court below upon the plea of another action pending, not being here reviewable, no assignment of error is predicated thereon.

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### ARGUMENT.

The opinion of the Supreme Court of the State (R. 53-71) contains an accurate and full statement of the controlling facts involved, and an extended review of

the authorities, on which conclusion and judgment granting the order is based.

I.

*The Plea of Res Adjudicata.*

The bill of the City against Murray, filed in the Circuit Court of the United States for the District of Idaho, is set forth in present record (pp. 30-36), together with the defendant's demurrer thereto (R. 37), and the opinion of the Court (R. 41-45). The relief prayed by the City in that suit was that the Court should "make, fix, and promulgate reasonable rates and charges for water to be furnished by the defendant \* \* \* to the plaintiff and its inhabitants for the period of three (3) years next ensuing from the date of the Court's order and judgment," enjoining the defendant from either fixing any other rate or charge or collecting or receiving any other or greater rate or rates, charge or charges, for water during that time; also that the Court appoint a receiver under its direction to collect, deposit, expend, and disburse the monthly or other cash revenues of the water company subject to the direction of the Court, and third, for final judgment to recover the penalties in the sums therein stated, and as provided by the State act of March 16, 1907—Section 2839, Revised Code. The opinion of the Court upon the pleadings, whilst holding that the ordinance here in question constituted a contract which could not be impaired by the subsequent statute of Idaho of March 16, 1907, *supra*, further expressed the opinion that if the Statute of Idaho was applicable:

"this court would still be without jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract, 'is a legislative or administrative, rather than a judicial, function.' *Reagon v. Farmers' Loan & Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1062, 38 L. Ed. 1031. *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12. This is the general rule, and the fact alleged in the bill that defendant has refused to join with the complainant in naming commissioners to fix the rates which he shall be allowed to charge for furnishing water under his franchise, as provided in the statute relied upon by complainant, is not sufficient to create an exception to the rule, and does not authorize the Court to extend its jurisdiction, and take upon itself the exercise of the 'legislative or administrative' power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years.

"The demurrer to the bill of complaint is sustained and the bill dismissed; the defendant to recover costs." (R. 44-45.)

In this connection it should be noted that the demurrer to the bill of the City was based primarily upon the ground that the Court was without jurisdiction of the bill of complaint, "the same not presenting a cause for equitable cognizance." (R. 37.) In reviewing the case as presented and ruled in the Federal Court, the Supreme Court of Idaho in the present case concludes as follows: (R. 59.)

"While the Court there took occasion to consider the effect of the statute (S.c. 2839) on the ordinance in

question and expressed the view that the statute was inoperative as against that ordinance, still it is clear to us that the Court disposed of the case on the sole ground that the Court has no jurisdiction to hear and determine the matter, it has no jurisdiction to pass upon any question except the jurisdictional question. (Fulton v. Hanlow, 20 Cal., 450; Burnett v. Smart, 59 S. W., 235, 158 Mo., 178; Waldon v. Badley, 14 Pet., 156, 10 L. Ed., 398; Hughes v. U. S., 4 Wall., 237, 18 L. Ed., 303; Brown v. McKie, 78 N. E., 64; 23 Cyc., 1218, 1309 and 1317). It could therefore follow that the only matter in that case that would become *res adjudicata* in the case at bar would be that a circuit court of the United States had no equitable jurisdiction to fix and promulgate water rates and charges which might be demanded and collected by a person exercising a franchise and supplying a city and its inhabitants thereof with water. That discussion and determination would have no application to a state court, for the reason that the distinctions between actions at law and suits in equity still prevail in the federal courts, and a federal court of equity has no power to grant relief at law nor has a law court any power to grant equitable relief; but such is not the case in the State courts, because both legal and equitable relief are granted by the same court, and no importance is given to the manner or form of pleading a cause of action so long as the facts pleaded entitle the pleader to relief of any kind. (Art. 5, Sec. 1, Constitution; Staples v. Rossi, 7 Ida., 618, 65 Pac., 67; Coleman v. Jagers, 12 Ida., 125, 85 Pac., 894; Dewey v. Schreiber Imp. Co., 12 Ida., 280, 85 Pac., 921.)

The judgment and order of the Circuit Court of the United States in dismissing the bill in City of Pocatello vs. Murray is no bar to the present action and does not estop the city from maintaining this action "

This conclusion of the State Court in present case is clearly correct. The essential elements of *res adjudicata*, as effective against the present proceeding are wholly lacking. In the Federal case the City sought direct relief by asking a Court of equity to prescribe a schedule of reasonable and proper rates, based upon the refusal of the defendant Murray to join with the City in the appointment of commissioners to effect that purpose, as prescribed by the State law. In present case, the City seeks to compel the defendant to name such commissioners pursuant to that law. The Federal Court ruled that it had no power to fix such rates and dismissed the bill of complaint, denying the relief there sought upon the sole ground of lack of jurisdiction. Here the City seeks to have the defendant perform his plain duty under the Statute. The object of each action is wholly different; the procedure is wholly different and the object sought to be accomplished in the present case bears no resemblance to the relief sought in the Federal case. Hence it is plain that the plea of *res adjudicata* is unavailing in this action because (1) the case in the Federal Court was dismissed solely upon the ground of lack of jurisdiction to grant the relief prayed by the City in that cause, and (2) because the basis of the relief sought in the Federal case was the failure of the defendant to appoint the commissioners as prescribed by the State statute, while here the sole object of the proceeding is to compel him to make such appointment. Denial of the plea of *res adjudicata* by the Supreme Court of Idaho is hence in no sense a denial of the full faith and credit clause of the Constitution, as plaintiff in error seeks to assert

The foundation of the rule and doctrine of *res adjudicata* requires the judgment or decree of a court of competent jurisdiction *upon the merits* in order to conclude the parties or bar a new action or suit. Among the cases cited *supra* in the opinion of the Supreme Court of Idaho upon this point will be found *Waldon vs. Badley*, 14 Pet., 156-161, wherein this Court said:

“As the first bill was dismissed for want of jurisdiction and the second by the complainants, at rules in the Clerk’s Office, it is clear that neither can operate as a bar to the present bill. A decree dismissing a bill generally may be set up in bar of a second bill having the same object in view; but the Court dismissed the first bill on the ground that they had no jurisdiction, which shows that the case was not heard on its merits.”

And in *Hughes vs. United States*, 4 Wall., 232-237, the rule was again thus clearly stated:

“In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point in controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or of parties or a misconception of a point of procedure, or want of jurisdiction, or was disposed of on any ground which did not go to the merits, the judgment rendered will prove no bar to another suit.”

And the rule is affirmed in a multitude of other cases, marshaled in *American & English Encyclopædia of Law*, Volume 24, Title *Res Adjudicata*, pp. 794-795.

That the decree of the Federal Court dismissing the bill was necessarily based wholly upon the ground of



had the power and authority to contract for a supply of water, and citing the provisions of Section 6, Article XV, of the State Constitution, ruled that:

“Until the Legislature provides a method for fixing the rates, the contract between the parties will govern.”

And the Court in present case quotes from the syllabus in the Jack case (stating that the same was written by the Court) as follows: (R. 62.)

“7. Under Section 6, Article 15, State Constitution, it is the duty of the legislature to provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold for or rented for a useful or beneficial purpose, and until that is done the owner and user may make such contracts therefor as may to them seem just and reasonable.

“8. Under the laws of this state, such a contract as that under consideration may be made to continue for thirty years, except that rates may be established from time to time as the legislature may by law provide.”

And the opinion in present case adds:

“In the case at bar, there is no doubt but that under the provisions of the act of February 10, 1899 (1899 Sess. Laws, p. 192), and particularly Section 39 thereof, the city of Pocatello had the power and authority to pass an ordinance and enter into a contract with defendant for the establishment of a water system and supplying water to the city and its inhabitants, but any such contract as it was within the power of the city to make was subject always to the power and authority of the legislature to prescribe a method of determining and

establishing reasonable, maximum rates to be charged as water rental." (R. 62.)

The opinion then proceeds with amplified discussion of cases ruled in this Court as sustaining its conclusion in present case that the contract between the City and Murray, whilst granting the right or franchise thereunder to continue for a period of fifty years from January 4, 1892 (then conferred by the village of Pocatello on Murray and named associates) (R. 6-7), as ruled in *Jack vs. Village of Grangerville, supra*, that the Legislature could thereafter exercise controlling power to provide the manner in which maximum rates may be established to be charged for the use of such water. The logical result of such holding was, of course, the Court's recognition of the State Act of March 16, 1907, now Section 2839 of the Revised Codes of Idaho as providing such method, and hence controlling here. For the sake of brevity we forbear extended discussion upon the cases cited and applied *in extenso* in the opinion of the Court, observing only that the application of the State statute under the power reserved in the State Constitution rests upon the same ground as that recognized in the exercise by the national Congress of like reserved power in respect of matters confided by the Federal Constitution to its legislative will. For illustration, we suggest that it has long and often been held that a State may authorize the construction of a bridge over navigable waters within its boundaries until Congress shall intervene by express legislation under the reserved Federal power of control of commerce between the States. Manifestly

where Congress should by special legislation determine to improve such waterway for the benefit of interstate commerce and authorize the Secretary of War to cause the change or removal of bridges found to be an impediment thereto, the owner of such bridge could not plead in avoidance of such requirement that the structure was when built a lawful one, and hence could neither be removed nor altered. The doctrine is clearly expressed in *Cardwell vs. American Bridge Company*, 113 U. S., 205, 208, thus:

"The questions thus presented are neither new nor difficult of solution. Except in one particular, they have been considered and determined in many cases, of which the most important are *Wilson vs. Blackbird Creek Marsh Co.*, 2 Pet., 245; *Pennsylvania vs. Wheeling Bridge Co.*, 13 How., 518, 564; *Gilman vs. Philadelphia*, 3 Wall., 713; *Pound vs. Turk*, 95 U. S., 459; *Escanaba Co. vs. Chicago*, 107 U. S., 678, and *Miller vs. Mayor of New York*, 109 U. S., 385. In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the Constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal police, which embraces among other things the construction, repair and maintenance of roads and bridges, and the establishment of ferries; that the States are more likely to appreciate the importance of these means

of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams."

While the opinion of the Supreme Court of the State renders further discussion of the cases therein cited unnecessary in this brief, it is obvious that the defense of the plaintiff in error here set up is untenable. All that is sought by the city in pending proceeding is to secure readjustment of the present schedule of rates to the municipality and individual users of water therein, and in so doing to observe the law of Idaho passed by the Legislature of that State in the unquestioned exercise of the legislative power conferred by the State Constitution. That power, we repeat, was in existence when the Ordinance of June 16, 1901, here in question, was passed by the city. Its exercise by the Legislature was, and is, in every view, wholly legitimate. By the express terms of the statute the plaintiff in error is given full opportunity to be heard by representatives of his own choosing, named pursuant to the statute. If the rates fixed by all the commissioners thus appointed are unreasonable and amount to confiscation, Mr. Murray may then resort to the courts for relief. But it is going far to say that the State Constitution, in existence at the time the ordinance here in question

was passed is to be subordinated thereto. If, for illustration, a schedule of rates had been fixed therein to endure for the full term of fifty years covered by the Ordinance, then in such view nothing which either the State or the City could do could give relief against admittedly grossly excessive charges, notwithstanding the clear terms of the State Constitution reserving such power to the Legislature. Such reasoning would inhibit the State from the exercise of its sovereign power of condemnation and in result declare that by reason of the contract asserted to exist under the Ordinance, the plaintiff in error was immune from any method for determining the cases of readjustment of its water rates save that expressed in such Ordinance. It is not conceivable that any such result can within reason be affirmed. That in result would simply be to abdicate all sovereign power of control, in direct conflict with the ruling of this Court in *Home Telegraph and Telephone Company vs. Los Angeles*, 211 U. S., 265 (fully cited in the opinion below), and which emphasizes the clear distinction between the governmental power of fixing charges and the power to enter into a contract to abandon the governmental power itself. Unless it be assumed that the State delegated the power of irrevocable contract to towns and villages to thus bind themselves without limit of time or amount, the reserved power of governmental control in the State and operating under State legislation must be recognized. If this ordinance is binding upon the State to the extent claimed by the plaintiff in error, it is, of course, likewise binding upon the State as sovereign. For if it cannot be changed by the City it cannot be

reached by State enactment. In this view the question looms much larger than this specific case here involved, and must necessarily extend to all cities and towns and villages within the State wherein water works have been established by legislative authority and consent. In other words, the State has delegated a power which in its exercise now forbids the State Legislature to provide for the readjustment of water rates by any other rule than that expressly prescribed in the agreement or Ordinance itself. And this notwithstanding the clearly reserved power to the Legislature of the State in the Constitution thereof to provide "the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose."

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### CONCLUSION.

From the record it is clearly apparent that the motion to affirm should be granted. What plaintiff in error claims to be a Federal question is, when analyzed, not a Federal question at all, for the statute (Section 2832, Revised Codes of Idaho, 1909), does not impair the obligation created by Ordinance No. 86. As explained by the Supreme Court of the State of Idaho in its opinion, the provisions of Sections 2 and 6 of Article 15 of the Constitution of the State of Idaho were in effect written into Ordinance No. 86, and became a part thereof. The provisions with reference to rates to be charged and with reference to readjustment of rates were agreed upon by the parties in con-

temptation of the exercise by the legislature of its power which the constitution reserved to it, and, therefore, when the city attempted to have a readjustment of rates made in accordance with the legislative enactment it was proceeding to do that which the plaintiff in error at the time Ordinance No. 86 was passed, agreed might be done, and is therefore in effect fulfilling and carrying out the terms of the said ordinance.

While plaintiff in error claims that there is a Federal question for this Court's consideration, the mere assertion of such a question is not sufficient to warrant the Court in assuming jurisdiction of the case on writ of error. In the words of Mr. Justice Peckham in *New Orleans Water Works Company vs. Louisiana*, 185 U. S., 343; 46 L. Ed., 936, 940:

"It has long been the holding of this Court that in order to warrant the exercise of jurisdiction over the judgments of state courts, there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed although the claim of a Federal question was plainly set up."

In *New Orleans vs. New Orleans Water Works Co.*, 142 U. S., 79; 35 L. Ed., 943:

"While there is in the amended and supplemental answer of the City a formal averment that the Ordi-

nance 909 impaired the obligation of a contract arising out of the Act of 1877, which entitled the City to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation, there must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay."

See also:

Hamblin vs. Western Land Co., 147 U. S., 531;  
37 L. Ed., 267.

Furthermore, argument on this question which plaintiff in error claims to be the Federal question in this case, is foreclosed by the numerous decisions of this Court wherein the same contention was made.

Tampa Water Works Co. vs. Tampa, 199 U. S.,  
241; 50 L. Ed., 170.

Home Telegraph & Telephone Co. vs. Los Angeles, 211 U. S., 265; 53 L. Ed., 176.

Louisville & N. R. Co. vs. Mottley, 219 U. S.,  
467; 55 L. Ed., 297.

The words of the Court in *Equitable Life Assurance Society vs. Brown*, 187 U. S., 309, 47 L. Ed., 190, are especially applicable to this case:

"From the analysis just made it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this Court as to foreclose further argument on the subject, and



hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in *New Orleans Water Works Co. vs. Louisiana*, 185 U. S., 336, 345; 46 L. Ed., 936, 941; 22 Sup. Ct. Rep., 691, and authorities there cited. It is likewise also apparent from the analysis previously made, that even if the formal raising of a Federal question was alone considered on a motion to dismiss, and, therefore, the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows since it is plain that if the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation a motion to affirm would have to be granted under the rule announced in *Chanute vs. Trader*, 132 U. S., 210; 33 L. Ed., 345; 10 Sup. Ct. Rep., 67. *Richardson vs. Louisville & N. R. Co.*, 169 U. S., 128; 42 L. Ed., 687; 18 Sup. Ct. Rep., 268, and *Blythe vs. Hinckley*, 180 U. S., 338; 45 L. Ed., 561; 21 Sup. Ct. Rep., 390. This being the case, it is obvious that on the record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect to finally dispose of this controversy."

We respectfully submit that the motion to affirm should be granted.

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JAMES H. McKENNEY,

IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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No. 575.

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JAMES A. MURRAY, DOING BUSINESS AS THE POCAHELLO  
WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF POCAHELLO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF  
IDAHO.

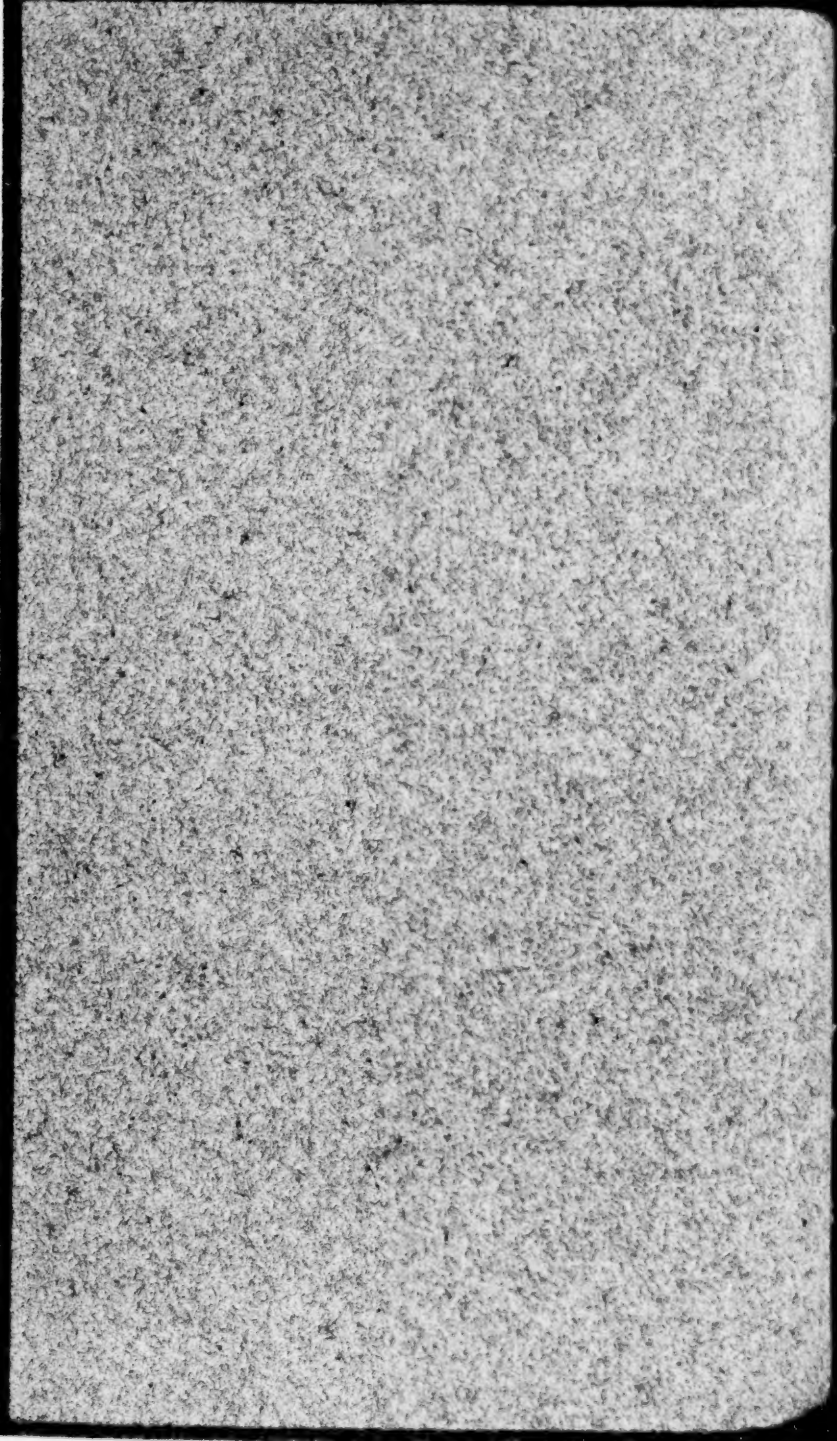
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BRIEF FOR DEFENDANT IN ERROR.

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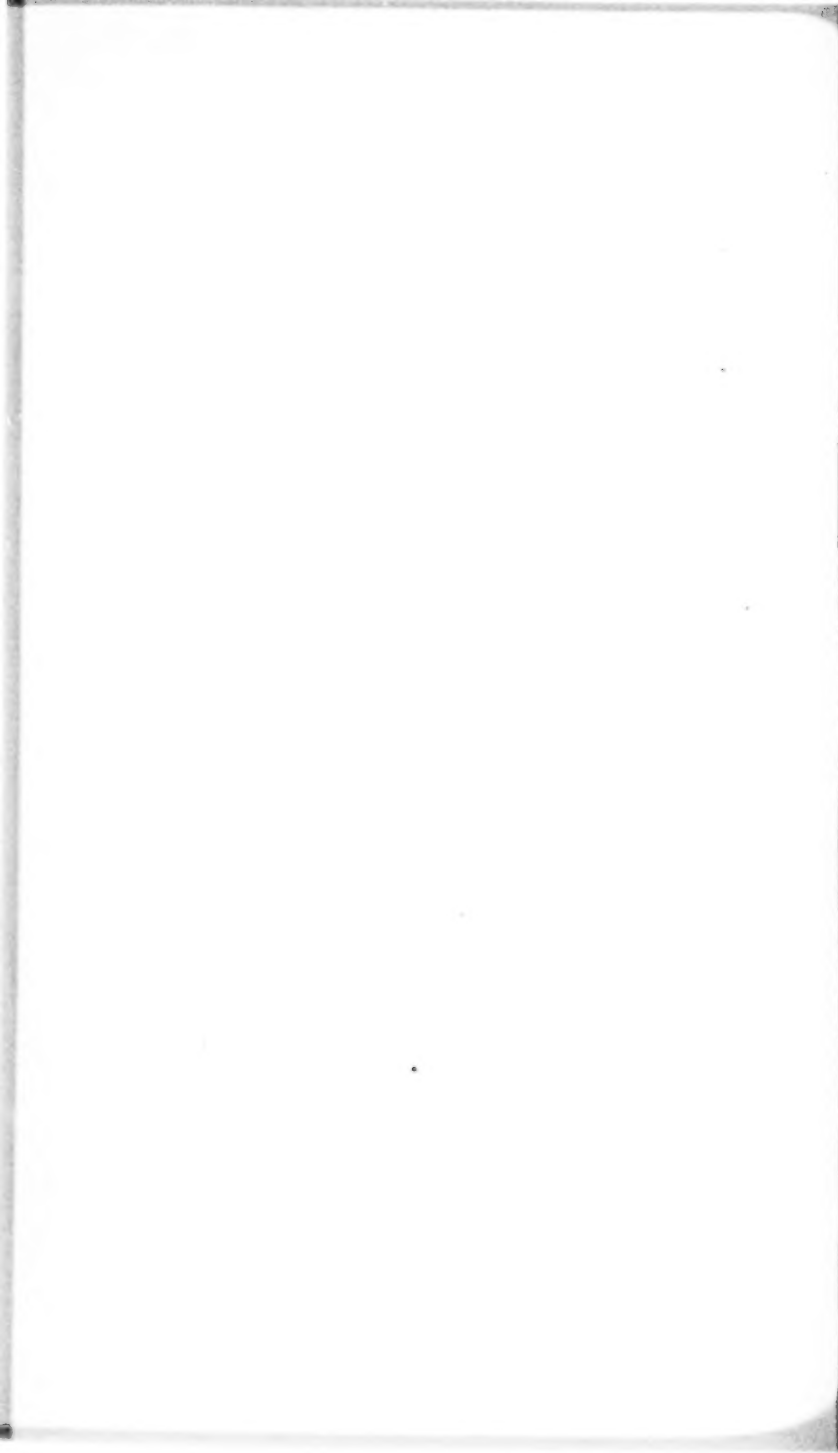
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IN THE SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, ~~1911~~ 1912.

No. ~~1048~~ 575.

JAMES A. MURRAY, DOING BUSINESS AS  
THE POCATELLO WATER COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF POCATELLO.

ARGUMENT.

Plaintiff in error relies upon two assignments of error, viz:

First. That "Section 2839 of the Revised Codes of the State of Idaho as enforced by the city council of Pocatello by Ordinance of July 6, 1911, and as construed and enforced by the Supreme Court of the State of Idaho, impairs the obligation of <sup>the</sup> contract between the plaintiff in error and the City of Pocatello, contained in Ordinance 86 of June 6, 1901."

Second. That "the Supreme Court of the State of Idaho, in judicial proceedings terminating in a judgment to which this writ of error is directed, refused to give full faith and credit to a final judgment therefore entered by the Circuit Court of the United States for the District of Idaho in a suit in equity between the same City of Pocatello as plaintiff, and



the same James A. Murray, so doing business as The Pocatello Water Company, as defendant, wherein it was decided that the said section 2839 of the Revised Codes of the State of Idaho would in fact and in law impair the obligation of the said contract contained in said Ordinance 86 of June 6, 1901."

Assignment No. 2 is first given attention in the brief of plaintiff in error, therefore we shall pursue the same order of discussion.

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*RES ADJUDICATA.*

Plaintiff in error contends, in effect, that because the United States Circuit Court for the District of Idaho, in decreeing a dismissal of the bill of complaint before it entered upon a discussion of the constitutionality of Section 2839, Revised Codes of Idaho, 1909, the decree is therefore *res adjudicata* upon that question. The premise does not justify the conclusion. It is a recognized principle that in order to render a matter *res adjudicata* there must be not only an identity of parties but an identity of the question litigated. There is also the additional requirement that where the second action is upon a different claim or demand the question determined in the first action must have been necessarily involved so that the decision of the court could not have been rendered in that suit without determining it. This principle is clearly announced by the Supreme Court of California. To quote:

"When, therefore, in the second action the former judgment is offered in evidence, it is necessary to ascertain in the first instance whether the cause of action

upon which it was rendered is the same as that under prosecution, and, if so, it becomes, as a matter of law, conclusive upon the rights of the parties in the second action. If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein; and the evidence which was introduced in support of such issues may always be introduced in support of a defense in any other action. The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense. For example, if, in a suit in ejectment, the defendant alleges and proves a right to the possession of the land by virtue of having acquired an estate therein for years, he will not be precluded, in a subsequent action against him by the same plaintiff to quiet title to the same land, from showing that he was, at the time of the former judgment, the owner in fee of the land. 'That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.' "—Code Civil Proc., 1911.

Lillis vs. Emigrant Ditch Co., 30 Pac., 1108,  
1110.

This court, also, after considering authorities which recognize the distinction pointed out by the California court, declared:

“These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel.”

\* \* \* \* \*

“On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.”

354-6

Cromwell vs. Sac County, 94 U. S., 351; 24 L.  
Ed., 195.

The requirement that the matter claimed to have been adjudicated must have necessarily been involved in the former suit, has been emphasized in some cases even where the second action was upon the same claim or demand. In Wash. Alex. & G. P. Co. vs. Sickles, ~~72 U. S.~~ 580; 18 L. Ed., 550, the second suit was based upon the same special contract which had, with certain common counts, been declared on in the first bill. The

general issue had been pleaded and a general verdict rendered in the first suit and the court held the plea of *res adjudicata* bad because it did not appear that the contract was necessarily involved in the first suit or that without its determination the verdict could not have been rendered. The following is from the opinion: <sup>(2592)</sup>

“As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde*, consistent with the record, may be received to prove the fact; but, even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.”

Let us apply these principles to the case at bar. What question was before the United States Circuit Court in Idaho for determination? In its bill of complaint the complainant, after the formal allegation of citizenship of the parties, and that the complainant is a municipal corporation and the defendant the owner

of the water system by which the inhabitants of said city and said city itself are supplied with water, alleges that the said Ordinance No. 86 was passed confirming and continuing to the defendant certain privileges and franchises formerly granted to his predecessors in interest; that the rates and charges for water specified in said Ordinance 86 have become and are excessive, extortionate and oppressive in each and every instance; that the legislature of the state of Idaho passed the statute, now known as Section 2839, providing the means by which rates and charges for water should be fixed, and prescribing a penalty for the refusal of any person, company or corporation supplying water to appoint commissioners as in said act provided; that pursuant to said statute the complainant appointed two commissioners and that the defendant refused to appoint a like number to act for him in the premises to fix water rates for the ensuing three years; that the defendant Murray is a non-resident of the State of Idaho and remains without the state for the express purpose of avoiding service and of defeating the appointment of commissioners, and that it is uncertain when service of summons can be made upon him; that said defendant is indebted to the complainant in the sum of fourteen thousand three hundred (\$14,300.00) Dollars, as a penalty for the refusal to appoint said commissioners; that one George Winter is the sole manager, director, responsible agent and superintendent of the defendant's water system, and that by arrangement with his principal the said Winter remits to different places without the state the money received

by said water company in payment of rates and charges for water in order to avoid the application of the same to the payment of the said penalty; that the said water system is mortgaged for four hundred thousand (\$400,000.00) Dollars, which amount is equal to or in excess of the present value of said system, and the complainant then alleges "that in order that it may have the relief to which it is entitled in the matter of fixing new rates and charges for water to be furnished by defendant under his said franchise to the plaintiff and its inhabitants for the period of three years now next ensuing, or any part of such relief, it is necessary that this court interpose and intervene by the exercise of its equity powers, and proceed to make and fix reasonable rates and charges in the premises, either in conjunction with the commissioners of the plaintiff, nominated and appointed as hereinbefore set out, or independent of such commissioners, and as to the court shall seem meet and proper." Then follows the prayer, first, for subpoena; second, that the court make, fix and promulgate reasonable charges for water to be furnished to defendant for a period of three years from the date of the court's order, and that defendant be restrained from making, fixing or promulgating any other rates; third, that the court appoint a receiver to keep all monthly or cash revenues and apply the same under the order of the court; fourth, that the plaintiff have judgment for the sum of fourteen thousand, three hundred (\$14,300.00) dollars for violation of said statute in refusing to appoint commissioners; fifth, for general relief.

From both the allegations and the prayer of the bill it is apparent that the complainant endeavored to make its appeal to the equity side of the court, the demand for the money judgment being made under the long established principle that an equity court, having once acquired jurisdiction retains jurisdiction for all purposes.

The demurrer was upon three grounds, viz:

1. That the court is without jurisdiction of the subject matter of the bill of complaint, the same not presenting a cause for equitable cognizance.

2. The complainant in and by its said bill has not made or stated such a cause as entitles it in a court of equity to any relief against the defendant as to any matters set forth in said bill.

3. Multifariousness.

Was it at all necessary under the issues thus raised for the court to pass upon the constitutionality of Section 2839? Complainant did not in any particular rely upon said section as the basis for its suit save as to the incidental element of relief—the money judgment—the right to which must fall if for any reason the case should be dismissed because not cognizable in equity. It was clearly proper to sustain the demurrer without reference to the Idaho statute for from a consideration of the bill itself it was the duty of the court to say that no case was presented justifying or authorizing the fixing of rates or the appointment of a receiver, or the granting of any other equitable relief included within

the general prayer without the slightest necessity for passing upon, or even considering the question whether Section 2839 impaired the obligation of the water company's contract with the city. The complainant in calling to the attention of the court in its said bill the said Section 2839 does not offer said section as the justification for its appeal to the court to fix water rates and charges, and, of course, it could not do so for that statute does not attempt to authorize the court to fix rates; furthermore, complainant prays that the court act either with its commissioners or independently of them. So that, the complainant merely appealed to the general equity powers of the court to furnish it relief from what it considered to be an intolerable condition whereby the city and its inhabitants were required to pay extortionate and oppressive rates. When the court's opinion is analyzed it is apparent that the consideration the court gave to the Idaho statute was not really essential to the conclusion reached by it upon the demurrer, because, as Judge DeHaven states:

“Even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the city of Pocatello, and so prescribes the methods by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract ‘is a legislative or administrative rather than a judicial function.’ ”



(173 Fed., 382, 385.)

How can it be said that a side discussion of the constitutionality of the Idaho statute wherein the court expresses the view that it is unconstitutional, concludes the defendant in error upon that question, when the court in substance distinctly states that should he have found the statute to be valid and applicable to the contract between the parties the judgment must nevertheless have been the same? The statute was regarded by the court without controlling effect in determining the issue raised by the demurrer and as therefore not of importance as a basis for his decision.

“A finding or judgment upon a point or issue which was immaterial to the decision of the case does not make it *res judicata*.”

23 Cyc., 1309, and cases cited.

“The estoppel of a judgment extends only to the points directly involved in the action and decided, and not to any matter which was only incidentally cognizable, or which came collaterally into the question, although it may have arisen in the case and have been judicially passed on.”

23 Cyc., page 1309.

“Where, in an action to set aside tax assessments on the ground that they constituted a cloud on plaintiff's title, the court found that the assessment was invalid, and then found that the defect, if any, appeared on the face of the assessment, so as to bring the cause within the rule that an action in equity will not lie to set aside an assessment void on its face as a cloud on title, and a judgment was directed dismissing the complaint, the

judgment was not *res adjudicata* as to the validity of the assessment."

Brown vs. McKie (N. Y.), 78 N. E., 64.

"A finding, in a former action between the same parties that a contract was executed as alleged, though the court declined to enforce it, for want of jurisdiction, is not sufficient to establish its execution in a subsequent action thereon."

Cauhape vs. Parke Davis & Co. (N. Y.), 24 N. E., 185.

In the last case cited the court states:

"The finding that there was such a contract was, at most, mere inducement or introductory to the finding of want of jurisdiction. It was not an essential ground upon which relief was denied, and the denial of relief did not rest upon it."

And to sustain the lower court's judgment it further observes:

"We think the judgment is right. It rests upon the principle that a former judgment is not available in a subsequent action for another cause between the same parties to establish any fact not material to the adjudication actually made in the former action."

The Supreme Court of California, in an opinion rendered by Mr. Justice Field, declares:

"As we read the decree, it is not an adjudication upon the character of the title of the city which the purchaser acquired from the sale and conveyance of the sheriff. There was, in fact, nothing before the court from which it could pass upon the character of the title.

The sheriff had advertised and sold whatever right, title and interest the city possessed in the premises which was the subject of levy and sale. He could sell no other title or greater interest. The city and county filed a complaint to restrain the execution of a conveyance to the purchaser; and the court adjudged that the sale was effectual to pass the title—that is, such title as the sheriff had sold, whatever it might be. It is that title and no other, to which the decree refers. If there were any doubt as to this construction, it is removed by that part of the decree which adjudged that there was no equity in the complaint. In thus adjudging, the court determined that the matters set forth as grounds for restraining the execution of the conveyance were insufficient to justify any interference with the action of the sheriff without passing upon the truth or falsity of those matters.”

Again:

“Indeed, we do not perceive that the court could with propriety have passed upon any question respecting the character of the title acquired, after it had arrived at the conclusion that there was no equity in the complaint, even if there had been, as there was not, any proofs before it on the subject. Nor does it matter whether its conclusion in this particular was correct or otherwise. When once reached, it only remained for the court to deny the injunction and dismiss the suit. The consideration of the character of the title was, then, foreign to the case, and entirely unnecessary for its disposition; and, as a consequence, any declaration in the decree as to that title was without any binding force as an adjudication either upon parties, privies, or anybody else. The legal operation, therefore, of the decree, as an adjudication between the parties, is precisely the same which would have followed had it simply

denied the injunction and dismissed the suit for want of equity in the complaint. It establishes the fact that the matters alleged were not sufficient for the exercise of the jurisdiction of a court of equity; it determines nothing as to the truth or falsity of those matters, or as to the rights of the parties upon them, when they are presented in a court of law."

Fulton vs. Hanlow, 20 Cal., 450.

"Although a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact."

People vs. Johnson, 38 N. Y., 63.

The fact that the court discussed the statute is not sufficient to render his conclusion as to its constitutionality *res adjudicata* for,

"The parties are not bound by remarks made or opinions expressed by the court in deciding the cause which do not necessarily enter into the judgment."

23 Cyc., 1218.

Braun vs. Wisconsin Rendering Co. (Wis.), 66 N. W., 196.

The fact that the Idaho statute was not set up or relied upon in plaintiff's bill of complaint in the United States Circuit Court as a basis for relief; that said court did not sustain the demurrer because of his conclusion that said statute was unconstitutional, but because, whether applying it or ignoring it, a judgment of dismissal was inevitable for want of equitable juris-

diction, should, we think, be sufficient answer to the contention of plaintiff in error that such judgment is conclusive as to the validity of said statute. However, additional reasons may be assigned:

---

*THE SUIT IN THE UNITED STATES COURT ONE  
IN WHICH COMPLAINANT THEREIN  
MISTOOK ITS REMEDY.*

The case in the United States Court may be properly classified as one in which complainant therein mistook its remedy. It applied to a court of equity, not for any relief which pursuant to the Idaho statute it conceived could be awarded to it, but for such relief as it considered said court, in the exercise of its general powers, could grant. Its proper remedy was at law—the remedy which it is now pursuing—to compel plaintiff in error to act with it in fixing rates in the manner provided by said statute. Because the city had mistaken its remedy—the court being without jurisdiction to grant the relief sought—the bill was dismissed. A judgment rendered under such a condition is not *res adjudicata*.

“In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the

merits of the action, the judgment rendered will prove no bar to another suit."

David M. Hughes vs. United States, 4 Wall.,  
232-237; 18 L. Ed., 303.

"A decree dismissing a bill in chancery generally may be set up in bar to a second bill, but where the bill has been dismissed on the ground that the court has no jurisdiction, which shows the merits were not heard, the dismissal is not a bar to a second bill."

Walden vs. ~~Bodley~~<sup>161</sup> et al., 14 Pet., 156; 10 L.  
Ed., 398.

"The fatuous choice of a fancied remedy that never existed and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through a mistake."

Barnsdall vs. Waltemeyer, 142 Fed., 415, 420.

Water, Light & Gas Co. vs. City of Hutchinson,  
160 Fed., 41.

The foregoing proposition is so well sustained by the argument of the court in the case of Barnett vs. Smart, 59 S. W., 235, that we quote at length from the opinion:

"It is insisted with great force by the learned counsel for appellant that the court's findings of facts in the equity suit are to be now taken as adjudications which the defendant is estopped to dispute, and that they conclusively establish in this suit that John L. Maxwell and Mary Cassell are entitled to an equitable interest of one-eighth each in the land to be realized

through the instrumentality of the plaintiff in this suit, Barnett, as substituted trustee. The proposition being that, although the bill was dismissed, yet, because its dismissal was on the ground that the plaintiff had an adequate remedy at law, it left all the findings of fact as binding adjudications. In support of this proposition, appellant quotes from a law writer: 'If a bill in equity does not show that there is an adequate remedy at law, and there is an answer in denial, and a plea setting up other defenses, and a trial on the merits, and a finding of facts, which show that there is an adequate remedy at law, for which reason the cause is dismissed, the finding so made is as conclusive as if the bill had been sustained. The result would have been the same if the bill had shown that there was an adequate remedy at law, and it had not been demurred to.' Van Fleet Former Adj., 41. The text writer cites some decisions sustaining that view, and some to the contrary, but thinks that the better doctrine. The theory of that doctrine seems to be that unless the defendant takes the position, by his answer or demurrer, that the plaintiff has an adequate remedy at law, and stands on that position alone, or if by his answer he puts the facts at issue, and submits to trial of the facts by the chancellor, he is bound by the findings, even though when it comes to pronouncing judgment the court should conclude that, as a court of equity, it is without jurisdiction and must dismiss the bill. We cannot give that doctrine our approval. However well that theory may be adapted to other systems, it is not in harmony under our code system of pleading and practice, in which, although the distinctions between law and equity are preserved, they are administered by the same court, and often so unite in the same case as that separate sets of issues are framed—the one in equity, to be tried by the chancellor, and the other at

law, to be tried by the jury. In this apparent union of law and equity jurisdiction in the same tribunal we recognize and follow substantially the cardinal principles that distinguish the two. If the plaintiff's cause is one falling within the jurisdiction of a court of equity, it will be tried as such, with all its issues, although some of the issues involved may be such, as if standing alone, are cognizable only in a court of law. But on the contrary, if the plaintiff's cause is an action at law, it must be tried as such, although the defendant interpose an equitable defense, which, as a preliminary issue, must be first tried by the court sitting in equity. Of course, if the defendant's answer amounts in effect to an admission of the plaintiff's legal cause of action, but seeks to overcome it by the equitable cross suit, the whole cause is converted into a suit in equity, and triable as such. Thus, we see that while under some conditions a court of equity may try issues purely legal in their character, and pronounce judgment thereon, yet a court of law cannot try issues purely equitable in their character, and pronounce a decree thereon. But, whenever either court is empowered to try the issue, it is empowered also to pronounce the judgment or decree appropriate to the facts found. To hold that a court is competent to try the issues of fact, and bind the parties by its findings, but must then send them to another tribunal for an appropriate judgment, would be to put the court in a strange position, and leave the party against whom the finding was in an unfortunate condition, deprived of his right of trial by jury, and deprived of his right of appeal. Because, with the facts found against him if the decree should be in his favor, he cannot appeal from those findings, and he must therefore go to the law court, not for trial, but to submit to the judgment already forecast. The more reason-



able and just rule is that, if the court had not jurisdiction to pronounce judgment on the facts found, its findings are not adjudications of the facts. We do not say that the court in such a case may not have had jurisdiction to try the issues of fact, because it may be that its jurisdiction to render final judgment would depend on its finding of the fact; but we do say that when the result is that the equity court is without authority to give effect in its judgment to the facts found, and for that reason must send the parties to a law court for the adjustment of their rights, the equity court cannot forestall the jurisdiction of that law court in the matter of its trial of the facts. \* \* \*

“But what the appellant is really insisting upon here is not only that the facts found by the chancellor are conclusive, but that his conclusions of law on those facts are judicial determinations of the rights of the parties. If we separate the facts in the chancellor’s findings from his legal deductions, we see that his facts are really undisputed. But when he says in his memorandum that Woodson died without executing the trust, and before the time came when it could have been executed, and that John L. Maxwell and Mary Cassell are now each entitled to one-eighth of the proceeds of the land to be sold, he is giving, not facts, but his opinion of the legal effect of the deeds in evidence. If, therefore, appellant’s view is correct, the case would go to the law court, not only with the facts all found, but also with the rights of the parties all adjudicated, and that, too, by a court that dismissed the suit because it was of the opinion it did not have jurisdiction to enter any other judgment. It is to be observed, too, that these legal opinions of the chancellor which the appellant deems adjudications are not even embodied in the decree, but are contained only in a

memorandum filed in the case.”

Plaintiff in error attempts to make a distinction between the dismissal of a bill for want of jurisdiction and a dismissal because it does not present a case cognizable in equity. This distinction is not recognized by the courts. If it appears from the bill of complaint that the court is powerless to grant any relief the ground of dismissal will be lack of jurisdiction. In the case of *Richards vs. Lake Shore & M. S. Ry. Co.* (Ill.), 16 N. E., page 909, the distinction which plaintiff in error attempts to make in the case at bar was there suggested. The court thus answers the argument:

“Counsel insist that the bill, if dismissed at all, should have been dismissed for want of jurisdiction, and not ‘for want of equity,’ as it was. This objection is without force. The dismissing of the bill on demurrer for want of equity practically amounts to the same thing as dismissing it for want of jurisdiction. *Winkler vs. Winkler*, 40 Ill., 179. While a bill may disclose legal rights, enforceable in a court of law, yet, if the facts stated do not bring the case within the ordinary jurisdiction of a court of equity, as was also the case here, there is neither jurisdiction nor equity in the bill. It may be stated as universally true that, as the expression is used and understood in equity law, there can never be equity in a bill where there is a want of jurisdiction. The dismissal of the bill in this case would present no defense whatever to an action at law on the contract. The only injury or prejudice resulting from the order of dismissal is the compelling of the complainants to bring their suit in the proper forum where it should have been brought in the first instance.”

In *Logan vs. Flattau* (N. J.), 67 Atl., 1007, it appeared that defendant had applied to a court of equity for specific performance of a contract and prayed also for general relief; that from the face of his bill he had no standing in equity and had been dismissed. Thereafter he brought suit for the money he had paid on the contract, which he had asked the equity court to enforce, and Logan, the defendant in that action, in the case above cited, sought to restrain the proceeding at law on the ground that under the prayer for general relief in his action for specific performance the court had power to award Flattau compensation by way of damages and that having had his day in court and been dismissed, he was estopped from maintaining a new action for such damages. But the court held that the suit in equity having been dismissed because equity would not assume jurisdiction, Flattau was not estopped from maintaining his said action at law.

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*JUDGMENT IS NOT A BAR BECAUSE IT IS, IN  
FACT, NO JUDGMENT AT ALL.*

Referring to the so-called judgment of the United States Circuit Court (Tr., p....), it will be seen that it is a clerk's judgment entered by the oral order of the court, therefore, it is not a final judgment such as could be appealed from. In fact, it is not a final judgment at all, but simply an order for a judgment. Rule 65 of the United States Circuit Court for the Ninth Circuit, provides as follows:

“Decrees in equity shall be signed by the judge and

filed and entered by the clerk; it shall not be necessary to the finality of a decree that they shall be enrolled, but all proper process may issue on a decree when it is entered."

Therefore, it is apparent that this clerk's judgment not signed by the judge, could not be a bar to any suit.

"Findings of fact made by the court, or decisions on contested issues, when made the basis of a judgment or decree, are conclusive upon the parties in subsequent litigation, but unless followed by a judgment or incorporated in or covered by a judgment, findings by the court, special findings of the jury, reports of referees and masters, and the like, are not conclusive adjudications."

23 Cyc., 1227.

This matter has been conclusively determined by the Supreme Court of the United States in two cases. In the case of *Life Ins. Co. vs. Wilson*, 8 Pet., 291<sup>307</sup>; 8 L. Ed., 949, it is held:

"By the law of Louisiana and the rule adopted by the District Court, the judgment without the signature of the judge cannot be enforced; it is not a final judgment on which a writ of error may issue for its reversal."

Again, in the case of *Yznaga Del Valle vs. Harrison*, 93 U. S., 233<sup>235</sup>; 23 L. Ed., 892, the court holds:

"That judgment is not rendered in Louisiana until it is signed by the judge."

The decisions in the two cases referred to are based upon the proposition that in the United States District

Court of Louisiana there was a rule of court adopting the state practice in this respect, and requiring judgments to be signed by the judge. It will be noted that in the District of Idaho judgments at law are not required to be signed by the judge, but decrees in equity must be signed, as provided in the rule referred to, and this rule follows the state practice. For this reason, also, the judgment is not *res adjudicata*. It is manifest, for the numerous reasons given, that the plea of *res adjudicata* cannot be sustained and that the Supreme Court of Idaho did not refuse to give full faith and credit to the judgment of the United States Circuit Court.

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*IMPAIRMENT OF OBLIGATION OF CONTRACT  
CONTAINED IN ORDINANCE NO. 86.*

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*Power to Fix Rates.*

In discussing this question we submit that the city did not have the power to prescribe the manner of fixing water rates in the city of Pocatello for a period of 50 years as provided in said Ordinance No. 86, for three reasons:

First: For the reason that the power to prescribe the manner of fixing rates to be charged for the use of water in the State of Idaho is reserved by the constitution of the state, and that reserved power is lodged in the state legislature, and is subject at all times to being prescribed, changed and modified by that body, and that constitution was in effect at the time Ordinance

No. 86 was passed.

Second: If there were no constitutional provisions the manner of fixing rates prescribed by Ordinance No. 86 is unreasonable, *ultra vires* and void for the reason that it fixes an arbitrary valuation as the basis of fixing rates without regard to the true value of the property.

Third: If there were no constitutional provision and the ordinance is reasonable, still the rate making power being a governmental and legislative power, the city could not by contract bind itself not to exercise such power.

In support of these propositions we submit that, when property is devoted to a public use it is subject to public regulation. When private property is affected with a public interest, it ceases to be *juris privati* only. This was the rule of the common law.

Munn vs. Illinois, 94 U. S., 113; 24 L. Ed., 77. <sup>133-4</sup>

“In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be reasonable compensation under such circumstances, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable.”

Munn vs. Illinois, *supra*.

“To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest is only changing the regulation which existed before. It establishes no new

principle in the law, but only gives a new effect to an old one."

Munn vs. Illinois, *supra*, 134.

Section 6 of Article XV, of the Idaho Constitution, provides that:

"The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

"The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Sec. 2 of Article XV, Idaho Constitution.

Under both the common law and the Constitution of the State, the legislature has the exclusive right to determine the manner in which *maximum* rates may be established for the use of water.

Municipal corporations possess no power except such as is conferred upon them by statute, either in express terms or by necessary implication.

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words. Second, those necessarily or fairly implied in or incident to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt con-

cerning the existence of power is resolved by the courts against the corporation, and the power is denied.”

Dillon on Municipal Corporations, 4th Ed.,  
Sec. 89.

Lewisville Natural Gas Co. vs. State of Ind.,  
21 L. R. A., 734.

In re Pryor (Kan.), 29 L. R. A., 398.

St. Louis vs. Bell Tele. Co. (Mo.), 2 L. R.  
A., 278.

Had the city of Pocatello on the 6th day of June, 1901, express power or authority granted it by the legislature to fix rates? The only provision of the statutes relating to this matter in force at that time are Section 2236 and Subdivision 37 of Section 2238, of the Revised Codes of Idaho. It is clear that under neither of the provisions referred to was the city of Pocatello expressly authorized to contract with defendant for the rates to be charged the citizens and inhabitants of the town for the use of water; neither did it have express authority under these statutes to contract with defendant for the manner of determining the basis upon which rates should be based.

Had the city of Pocatello implied power or authority to fix rates? In answering this question we first desire to call the attention of the court to the rules of construction applicable in such cases. The power to regulate rates is a governmental power exercised under the police powers of the state.

Munn vs. Illinois, 94 U. S., 124; 24 L. Ed., 77.



“This power of regulation is a power of government *continuing in its nature*, and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent.” 307

Railroad Commission Cases, 116 U. S., 325; 49 L. Ed., 636.

Budd vs. New York, 143 U. S., 517; 36 L. Ed., 347.

In another case the Supreme Court of the United States in considering this question, said: <sup>(1237)</sup>

“These acts are urged to establish the power in the Village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888 \* \* \*. A strict construction must be exercised. The contract claimed concern governmental functions and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.”

Rogers Park Water Co. vs. Fergus, 180 U. S., 624; 45 L. Ed., 702.

“Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and, unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction, as the common interests may seem to require. As was said by Chief Justice Taney, speaking for the court in *Charles River Bridge vs. Warren Bridge*, 11 Pet. (U. S.), 547, 9 L. Ed., 773-938: ‘It can never be assumed that the government intended to diminish its power for accomplishing the end for which it was cre-

ated.' This is an elementary principle."

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Ruggles vs. Illinois, 108 U. S., 526; 27 L. Ed.,  
812.

The latest expression upon the subject from the Supreme Court of the United States is found in *Home Telephone & Telegraph Co. vs. City of Los Angeles*, 211 U. S., 265; 53 L. Ed., 176, decided November 30, 1908. This identical question was before the court in that case. The governing statute and charter of the city before the court in that case was so much broader and so much clearer on the subject that what was said by the court in that case applies with still greater force to the case at bar. The court there said: <sup>(p. 213)</sup>

"The surrender, by contract, of the power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the Supreme legislature (in this case, the legislature of the state), has the authority to make such a surrender, unless the authority is clearly delegated to it by the Supreme legislature. *The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required.* This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon that point.

"It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be

charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit vs. Detroit Citizens' Street R. Co.*, 184 U. S., 368, 382; 46 L. Ed., 592, 605, 22 Sup. Ct. Rep., 410; *Vicksburg vs. Vicksburg Waterworks Co.*, 206 U. S., 496, 508; 51 L. Ed., 1155, 1160, 27 Sup. Ct. Rep., 762. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

(Citing numerous authorities.)

The case just cited is so directly in point and being concurred in by all the justices of this court, we deem it unnecessary to cite further authorities on the subject. It will be noted that the court says that there can be no implied authority to suspend the constitution, or stay the hand of the legislature in the matter of fixing rates for public service corporations. The court unqualifiedly says "specific authority for that purpose is required."

On this general question the case of *Louisville & Nashville R. R. Co. vs. Mottley*<sup>214 U. S. 467</sup> is particularly illuminating, and the reasoning of ~~Judge~~<sup>Justice</sup> Harlan in that case so completely answers the contention made by counsel in this case<sup>(16-455-6)</sup> that we quote at length from that decision as follows:

“We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress, by any statute subsequently enacted, make its enforcement by suit impossible? There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the constitution. *Gibbons vs. Ogden*, 9 Wheat., 1; 6 L. Ed., 23; *Brown vs. Maryland*, 12 Wheat., 419; 6 L. Ed., 678; *Addyston Pipe & Steel Co. vs. United States*, 175 U. S., 211, 229; 44 L. Ed., 136, 143; 20 Sup. Ct. Rep., 96; *Seranton vs. Wheeler*, 179 U. S., 141, 162, 163; 45 L. Ed., 126, 137; 21 Sup. Ct. Rep., 48; *Chicago, B. & Q. R. Co. vs. Illinois*, 200 U. S., 561; 50 L. Ed., 596; 26 Sup. Ct. Rep., 341; 4 A. & E. Ann. Cas., 1175; *Union Bridge Co. vs. United States*, 204 U. S., 364, 409; 51 L. Ed., 523, 539; 27 Sup. Ct. Rep., 367; *Atlantic Coast Line R. Co. vs. Riverside Mills*, 219 U. S., 186, 202, ante, 167; 31 Sup. Ct. Rep., 164.

“In the *Addyston Pipe* case, this court said that, under its power to regulate commerce, Congress ‘may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.’

“In the *Seranton* case, where a riparian owner sought compensation from the government because his access

to navigability had been materially obstructed by a pier constructed by the government on the submerged grounds in front of his land, this court said 'The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property, for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce.'

"In the Union Bridge Co., the question was as to the constitutional authority of the government to require the bridge company to make certain changes or alterations in the bridge across a navigable river of the United States, in Pennsylvania, and which bridge the company owned and constantly used. It is admitted that the bridge had been lawfully erected. But ultimately, in view of the necessities of interstate commerce, it had become an unreasonable obstruction to free, open navigation by vessels and boats then in use, and, for that reason alone, the government, by its constituted authorities, proceeding under an act of Congress, ordered the bridge company, at its own cost, to make certain changes and alterations in the structure. This court held that there was no taking of property for public use in the constitutional sense, and that although the bridge, when erected under the authority of Pennsylvania, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce, as then carried on, 'it must be taken,

under the cases cited and upon principle, not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions.'

"Long before the above cases were decided it was said in *Legal Tender Cases*, 12 Wall., 550, 551, 20 L. Ed., 311, 312, that, 'as, in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.'

These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist.

"It is said that if Congress intended by the commerce act to embrace such a case as this, then the

act is repugnant to the Constitution. Does the act infringe upon the constitutional liberty of a citizen to make contracts? Manifestly not. In the *Addyston Pipe* case (p. 228), above cited, the court said: 'We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress, and prevents it from legislating upon the subject of contracts' relating to interstate commerce. Again: 'But it has never been, and in our opinion ought not to be, held that the word (liberty) included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of the interstate commerce, and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the states. \* \* \* \* Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.'

"These authorities and principles condemn the proposition that the defendants in error had the constitutional right, pursuant to or because of the agreement of 1871, and during their respective lives, to accept and use free transportation for themselves, as passengers, on an interstate train, after Congress forbade, under penalty, any interstate carrier to demand, collect, or receive compensation for transportation, or any

interstate passenger not within the classes excepted by the act, to use transportation tickets, except upon the basis fixed by the carrier's published schedule of rates. After the commerce act came into effect, no contract that was inconsistent with the regulations established by the Act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. It is not determinative of the present question that the commerce act, as now construed, will render the contract of no value of the purpose for which it was made. In *Legal Tender Cases*, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, it has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.'

"In *Fitzgerald vs. Grand Trunk R. Co.*, which was the case of a contract for the transportation of lumber through several states, the supreme court of Vermont said: 'Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of



subsequent legislation upon its subject matter by competent legislative authority.' 63 Vt., 169, 173; 13 L. R. A., 70; 3 Inters. Com. Rep., 633; 22 Atl., 76.

"In Pomeroy on Contracts 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding, and that no action in law or equity could be maintained upon it, it was said: 'This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by a subsequent statute.' Among the cases cited by the author in support of that view was *Atkinson vs. Ritchie*, 10 East, 530, 534, in which the Chief Justice, Lord Ellenborough, delivering the opinion of the court, said: 'That no contract can properly be carried into effect which was originally made contrary to the provision of law, or which, being made consistently with the rules of law, at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.' In *Kentucky & L. Bridge Co. vs. Louisville & N. R. Co.*, 2 Inters. Com. Rep., 102, 34 Am. & Eng. R. Cas., 630, Judge Cooley said: 'But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general law, even when in no way referred to. \* \* \* But this incidental effect of the general laws, is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.' 'If one agrees,' said Mr. Par-

sons, 'to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise.' Parsons, Contr. 6th Ed. 675.

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves in the anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

The decisions of the Supreme Court of Idaho on this subject are in complete accord with the decisions of the Supreme Court of the United States.

That court in considering Section 6 of Article XV of the State Constitution and the right of the city to fix maximum rates which would be effective until the legislature should act and provide by statute some other method for determining rates, said:

"Until the legislature provides the method for fixing rates, the contract between the parties will govern."

Jack vs. Village of Grangeville, 9 Ida., 291-313.

In the syllabus prepared by the court in the case above cited, it is said:

"Under the laws of this state, such a contract as that under consideration may be made to continue for thirty years, *except that rates may be established from time to time as the legislature may by law provide.*"

The Supreme Court of Ohio in the City of Zanesville vs. Zanesville Gas Light Co., 23 N. E., 555, 559, in discussing this identical question, said that:

"The town had then no legislative authority, as the city has now, under Section 2478, Rev. St., to regulate the price of gas. It had, however, the right, in granting the company the use of its streets, to fix a maximum at which gas should be furnished it during the continuance of the privilege; and this it did by the above provision. *It did not tie up the hands of the legislature to confer such power on the town council when, in its opinion, the exercise of the power became necessary for the public good; nor did it place the company in a more favorable position than if the provision had been entirely omitted.* In such case, it could have fixed its own rates as it saw fit, until the legislature intervened and conferred the power on the council to regulate the price of gas. The fact that the company may have possessed such right before the legislature intervened does not affect the question. 'It matters not, in this case,' said Chief Justice Waite in *Munn vs. Illinois*, 'that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the powers of the body politic to require them to conform to such regulations as might be established, by the proper authorities, for the common good. They entered upon their business, and provided themselves with the means to carry it on, subject to this condition. If they did not

wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them as does to the proprietor of a hackney carriage; and, as to him, it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriages, and established his business, before the statute or ordinance was adopted.' 94 U. S., 133. The application of these observations to the gas company, in the case before us, are very apparent. The plaintiffs in error in that case were natural persons, possessed of the common law right to fix their own charges for handling grain, until the legislature of Illinois passes the act regulating the same. The ground of the decision sustaining the validity of the act is that they had devoted their property to a public use, and enjoyed a virtual monopoly of the business at that point."

In the case at bar, defendant took his franchise under a constitutional provision which commanded the legislature to "provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

Sec. 6 of Article XV.

This constitutional provision was as much a part of the franchise as if it had been written into it. The city was powerless to provide any "manner in which reasonable maximum rates may be established" that would in any manner conflict with such as might be established by the legislature. Any regulations in relation to that matter which the city would make could

at most, as stated by the Idaho court in *Jack vs. Village of Grangeville*, and by the Supreme Court of Ohio in the case just cited, continue in force only until such time as the legislature may by law carry out the constitutional provision above referred to.

The Supreme Court of the United States in *Tampa Water Works Co. vs. Tampa*, 199 U. S., 241, 50 L. Ed., 170, had this identical question before it, but under a constitutional provision that was not as direct and positive as the provision of the Idaho constitution, and the court there said:

“We turn to the construction of the constitution of the state. There was some argument that the clause was not self-executing. But so far as it expressed a power of the legislature, of course, as soon as the constitution went into effect, that power existed at once, *and contracts afterwards were made subject to the possibility of its exercise, as it was expressed by the subsequent statute.*” (Citing cases).

That the constitutional provision hereinbefore referred to constituted a warning to all persons who might deal with municipal corporations as to such matters, it would seem no one can deny. It is a provision of which all must take notice who contract with such corporations.

Defendants have relied largely upon the decision in the case of *Los Angeles vs. Los Angeles City Water Co.*, 177 U. S., 558, 44 L. Ed., 886, but it requires but a casual examination of that decision to determine that it has no application to the case at bar. It is true that

in that case the charter of Los Angeles in 1868 when the franchise was granted, conferred power to the city in most general terms in relation to providing a water system, but on April 2, 1870, the legislature of California by special act which it had authority to pass under the constitution, ratified and confirmed in its entirety each and every provision of the franchise which the city had granted and under which the water company claimed immunity from subsequent legislation. The franchise in that case, therefore, constituted a contract expressly authorized by the legislature and the question of authority in the city to make the franchise was entirely eliminated from the case. The decision in that case, therefore, is not authority upon the proposition as to whether the City of Pocatello had implied authority under the laws of this state to enter into the contract in question with the defendant.

Since the Los Angeles case was decided, this court has repeatedly passed on this question, and it is to be noted that it has not in any of the subsequent cases followed the decision in the Los Angeles case. It has held directly the contrary in the following cases involving water franchises:

Freeport Water Co. vs. Freeport, 180 U. S.,  
587; 45 L. Ed., 679.

Danville Water Co. vs. Danville, 180 U. S.,  
619; 45 L. Ed., 696.

Rogers Park Water Co. vs. Fergus, 180 U. S.,  
624; 45 L. Ed., 702.

Tampa Waterworks Co. vs. Tampa, 199 U. S.,  
241; 50 L. Ed., 170.

But as hereinbefore stated, the last expression of <sup>this</sup> ~~that~~ court upon the questions directly involved in the case at bar, is found in Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S., 265; 53 L. Ed., 176. In discussing the power of a municipal corporation to enter into such contracts, it said in that case: <sup>(p. 273)</sup>

“The general *powers* of a municipality or of any other political subdivision of the state are not sufficient. *Specific authority* for that purpose is required. *This proposition is sustained by all the decisions of this court*, which will be referred to hereafter, and we need not delay further upon this point.”

We have, therefore, in that case, the construction by this court of the previous decisions upon which counsel for defendant rely. <sup>(p. 276)</sup> In referring to the Los Angeles case the court says:

“The contract was in specific terms ratified and confirmed by the legislature.”

The authorities are agreed, however, on the proposition that although a city is given power to contract for a water supply, a legislature may subsequently supply a manner of readjusting or fixing rates. Perhaps this question has been more fully presented in the case of City of Danville vs. Danville Water Company than in any other decided case. That case was three times in the Supreme Court of Illinois and finally went to this court.

53 N. E., 118.

54 N. E., 224.

57 N. E., 1129.

180 U. S., 619; 45 L. Ed., 696.

In that case the Supreme Court of Illinois held that the fixing of water rates was a public attribute and that to contract for rates that would be paid for a definite term required authority of the legislature, and that no such grant to the municipality had been conferred, and that because the legislative act gave power to contract for a definite time for a supply of water, this did not give the right to fix the rates to be paid for the water during the time for which the municipality was authorized to contract, the argument being that the power to contract for a definite time is one thing and the fixing of rates for the same time for the water contracted for is another <sup>and</sup> different thing.

This decision by the Supreme Court of Illinois was affirmed by the Supreme Court of the United States on the authority of the case of Freeport Water Co. vs. Freeport, 180 U. S., 587; 45 L. Ed., 679, that case also being one appealed from the decision of the Supreme Court of Illinois, The Supreme Court of the United States, states, the matters decided by the Supreme Court of Illinois to have been as follows:

“The Supreme Court did decide in the case, first, that the water company having been incorporated under the general incorporation act approved April 18, 1872, the provisions of the act entered into and forming a part of its charter, and that by Section 9 of the act the right of the legislature to regulate and provide



for the rates at which the company should supply water to the city was reserved; and second, that the language of the act of April 9, 1872, and in force July 1, 1872, did not necessarily imply the power to make and fix rates. The court further said in 178 Illinois at page 309, 53 N. E. Rep., 122: 'The authority to contract for a supply of water for public use for a period not exceeding 30 years does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time and the rate to be settled by the rules of the common law.' "

This court after stating in the above language the matters decided by the Supreme Court of Illinois, affirmed its decision.

See also:

Knoxville Water Co. vs. City of Knoxville, 189  
U. S., 433; 47 L. Ed., 887.

The foregoing cases hold that a constitutional provision, such as our own, is self-executing to the extent that contracts made after it went into effect are subject to the possibilities of the exercise of the power conferred on the legislature by such provision.

Under constitutional provisions similar to those of Idaho it has been held that the legislature has a right to change the methods by which water rates are to be determined.

Spring Valley Water Co. vs. Schottler, 110  
U. S., 376; 28 L. Ed., 173.

"An ordinance granting an exclusive franchise to a

water company with the right to use streets requiring municipalities to pay certain rentals and binding the grantee among other things to furnish an adequate supply of water does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee 'shall charge the following annual rate to the consumer of water during the existence of this franchise,' as this is merely the regulation of the right to charge rates and does not amount to a stipulation that no other regulation will be made during the term of the franchise."

Rogers Park Water Co. vs. Fergus, 180 U. S., 624; 45 L. Ed., 702.

#### *AUTHORITIES CITED BY DEFENDANT.*

The authorities cited by defendant on the constitutional questions involved are completely answered and distinguished by this court in the case of Home Telephone & Telegraph Co. vs. <sup>(66-276-7)</sup> City of Los Angeles, supra, in the following language:

"The decisions of this court upon which the appellant relies where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In Los Angeles vs. Los Angeles City Water Co., 177 U. S., 558; 44 L. Ed., 886, the contract was in specific terms ratified and confirmed by the legislature. In Detroit vs. Detroit Citizens' Street R. Co., 184 U. S., 368; 46 L. Ed., 592, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities.' The opinion of the court, after saying, 'it may be conceded

that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare," pointed out that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland vs. Cleveland City R. Co.*, 194 U. S., 517; 48 L. Ed. 1102, the legislative authority conferred upon the municipality was described in the opinion of the court as 'Comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated.' In *Cleveland vs. Cleveland Electric R. Co.*, 201 U. S., 529; 50 L. Ed., 854, precisely the same authority appeared. In *Vicksburg vs. Vicksburg Waterworks Co.*, 206 U. S., 496; 51 L. Ed., 1155, the court said: 'The grant of legislative power upon its face is unrestricted, and authorized the city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.' Moreover, in this case the construction of the supreme court of Mississippi of its own statutes was followed."

In conclusion upon this branch of the case, it appears to us that the above authorities are conclusive and completely answer every theory suggested by counsel for defendant.

This analysis of these cases is the analysis made by the Supreme Court of the United States itself, and indicates an intention by this court to restrict the holding of these cases rather than to enlarge <sup>them</sup>. All of these cases clearly indicate that the matter involved is one for the state court to decide. In other words, the

construction of the constitution of the State of Idaho being involved in this suit, the Supreme Court of the United States will very strongly lean towards the construction given that constitution by the state court, and further than that, the tendency of later decisions is clearly to hold that all doubtful matters in cases of this kind will be decided in favor of the public. We believe the authorities above cited to be conclusive of the case at bar. We believe that there is not one case cited by the defendant which decides issues similar to those presented in this case; but, however that may be, the later cases and the later opinions of the court seem to indicate that the courts will lean towards a construction of the law that will be in favor of the public generally, rather than in favor of a construction which takes away from the people the right to regulate public service corporations.

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*THE MANNER OF FIXING RATES PRESCRIBED  
BY ORDINANCE NO. 86 IS UNREASONABLE,  
ULTRA VIRES AND VOID.*

We respectfully urge that leaving aside any constitutional question, that it was not within the power of the city council of Pocatello to provide an arbitrary method of fixing the value of the Pocatello water plant, and make that value the basis of the ascertaining of a reasonable water rate, and that, therefore, the provisions of this ordinance as to the manner of fixing rates are wholly *ultra vires* and void. By referring to the ordinance, it will be noted that it contains the

following provisions:

First—A provision that the men who establish the rates shall be selected from one certain profession and from one society. In other words, they must all be Hydraulic Engineers, and also members of the American Society of Engineers.

Second—When these men have met for the purpose of ascertaining the value of the plant as a basis of fixing rates, the following question shall be submitted to them, "For what sum can the water system of James A. Murray be now duplicated?"

Third—Their decision shall be final.

Fourth—The water system shall be held to mean and include pipes, mains, hydrants, conduits, ditches and reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, contracts, officers, bonds, appliances, machines, tools, implements, storage ground, material on hand, and all rights and property of whatsoever kind, either in use or on hand, and belonging to said James A. Murray in his capacity of furnishing water for any and all purposes to himself and to his customers at Pocatello, Idaho.

Fifth—Each of said articles shall be separately considered and valued by the committee.

Sixth—Their finding shall be conclusive.

Referring to each of these conditions as to the manner of fixing rates it appears to us, first, that it is not fair or reasonable or within the power of the city

council to contract and agree that only Hydraulic Engineers who are members of a certain society of engineers shall have the right to pass upon the value of this plant for the purpose of fixing rates. If this condition in this ordinance is valid no apparent reason exists why it might not have been provided in this ordinance that only engineers who were members of the Masonic Lodge might be eligible to value this plant. Other illustrations might be given, but it seems unnecessary. We believe that it was not within the power of the council to place in this ordinance any such condition. Second, but one question is to be submitted to this committee, that is, the cost of duplicating the system. This amounts to asking, for what sum could a system be constructed, which exactly resembles or corresponds to the water system of James A. Murray? It will be quite apparent to the court that such a provision as to valuation is entirely unreasonable. For instance, thousands of dollars may have been wasted in constructing a pipe line that will not properly convey water, or in constructing useless and inadequate reservoirs, or Mr. Murray may have laid pipes in the streets that were so small that the city has outgrown them, and they will have to be taken up and replaced and are in their present condition of no value at all. Mr. Murray may have expended a great amount of money in connection with this water system for useless appliances that do not add anything to the real value of the system for the purpose for which it was constructed, and yet the engineers who value the plant for the purpose of fixing rates have no right to consider

the value of these items, but can only consider what it would cost to duplicate them, and a rate must be fixed that will yield a certain rate of interest on the value of duplication, not the value of the plant. Again, not being satisfied with having this advantage, which is an enormous one, it is again provided that each article going to make up the system, each article used by Mr. Murray for the purpose of delivering the water to the inhabitants of the city or to himself, and also the franchise and water rights shall be separately considered and valued. If the court in this case holds that these sections of this ordinance are valid and binding upon the city of Pocatello, that city is left absolutely at the mercy of this water corporation, because no matter what may be said by counsel about these provisions of this ordinance, the fact remains that under them there is no possible way whereby the city of Pocatello can have a fair and just rate established for the use of water in the city; after the commission provided has acted, the amount of the rate is a mere matter of computation. Every railroad in the county has had to submit to having their rates fixed by the people who used the railroads and it seems to us that there can be nothing in the contention that the people of Pocatello will not treat this water company fairly and honestly. If the people of Pocatello do not treat Mr. Murray fairly and honestly there can be no question as to the right of the water company to resort to the courts, but on the other hand, if this contract is held valid the decision of these engineers who belong to this particular society, as to the value of this property, is

final and the people of Pocatello after the valuation is made will be compelled to swallow their choking sense of injustice and continue to pay unjust water rates, and the constitution of this state will be virtually annulled, and set aside. We believe that this court will hold that any council, even if it had the power to prescribe the manner of fixing rates, could not fix an unjust and arbitrary method of valuation, such as is provided in this ordinance. Every court that has passed upon this question has held that in fixing rates the thing to be ascertained is the present reasonable value of the property devoted to the public use, and that a deduction must be made from the cost of reproducing a waterworks plant on account of depreciation from age and use, and on account of any other proper matter having a bearing on its value when determining the present value of the tangible property for the purpose of testing the reasonableness of the rates fixed by the municipal ordinance.

*Knoxville vs. Knoxville Water Co.*, 53 L. Ed., 371. <sup>212 W. 1,</sup>

*Contra Costa Water Co. vs. City of Oakland*, 113 Pac., 668.

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*EFFECT OF PROVISIONS IN CONTRACT AS TO  
METHOD OF VALUATION AS BEING AN  
INTERFERENCE WITH THE POWER OF THE  
STATE TO FIX MAXIMUM RATES.*

Counsel seem to argue in their brief that the provision contained in Ordinance No. 86 providing for a



method of valuation does not interfere with the governmental power residing in the state to prescribe the manner of fixing maximum rates, but that it merely provides a method of valuation and that it is still up to the commission to be appointed under the Idaho statute to fix the rates. This contention is without merit for the reason that the only really important question to be determined in deciding what is a reasonable maximum rate is the question of the valuation of the water system. After that valuation is arrived at, the rate to be charged is a mere matter of computation, so that if a commission, appointed under the statute, is compelled to take the valuation made by the commission under the ordinance as the valuation upon which to base its maximum rates then there would be nothing left for the commission to do but to figure five per cent on that valuation. The result of this argument leaves the city in this position, that an entirely arbitrary and illegal method of valuation, which is the only real question at issue in fixing reasonable maximum rates, is provided in the ordinance and the method of arriving at the valuation prescribed in the ordinance is such that no reasonable rate can be arrived at and the result is that the city is compelled to pay an unreasonable rate and not a rate based upon the true value of the plant. Therefore, the effect is that the ordinance does not interfere with, but absolutely takes away the power of the legislature to prescribe a manner of fixing reasonable maximum rates, and the jurisdiction of the legislature is entirely ousted, and at any rate the city is entitled to have the commission

appointed even though the court should hold that commission must adopt as a basis for fixing rates the valuation arrived at by the Hydraulic Engineers. We desire to be entirely clear when we say that the only really material question involved in the fixing of rates for a public service corporation is to arrive at a just and legal valuation of the property of the public utility corporation, and this ordinance, taking away from the city, as it does, the power to arrive at a just and legal valuation of the water system, in substance and effect and in terms takes away from the State of Idaho the power to prescribe the manner of fixing reasonable maximum rates.

We submit that counsel's contention in this respect cannot be sustained either upon reason or authority.

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### *THE BASIS OF VALUATION.*

Under this heading counsel cite various factors which have been considered by the courts and commissions in arriving at a basis of valuation in fixing rates, and the citation made by the defendant discloses the fact that the method provided in Ordinance No. 86 is entirely unreasonable and has never been considered to be the true test of the valuation of a plant for the purpose of fixing rates. The franchise in this case is a fifty year franchise. It is within the common knowledge of everyone that service pipes used for the conveying of water in water systems do not have a life of more than twenty years ordinarily, and in a given case it is entirely possible, and indeed probable, that

the life of the pipes through which this water is conveyed has entirely expired, and that the pipe is of no value at all. Assuming that it would cost Two Hundred Thousand (\$200,000.00) Dollars to lay new pipe in place of this old pipe, which has no value at all, the argument of counsel leads to the conclusion that under this ordinance it would be necessary to pay a sufficient amount to buy new pipe to replace the old, and to lay it in place of the old, and again, as heretofore suggested, this water system may not be worth one-half the cost of duplicating it at the present time because it may be constructed in such a way as to be of little value, and yet the cost of duplicating it might be very heavy. A great many considerations should be taken into account by commissions and courts in determining the value of a plant used for a public utility and this ordinance takes away the power to take into consideration but one question, and it then provides that the finding made by this commission shall be final. In other words, no further inquiry can be made. This provision, therefore, seems to be an unjust, unreasonable and oppressive provision.

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#### *PERSONNEL OF COMMISSION.*

Counsel in their brief object to the personnel of the commission provided by the Idaho statute. It is, however, such a commission as the legislature of Idaho had a legal right to provide. This commission does not have the right to establish rates and make them final and conclusive, but any action taken by the commis-

sion is, under the Idaho law, always subject to revision by the courts if the action of the commission should be unreasonable, arbitrary or unjust. As stated by the Idaho court, the Constitution of the State of Idaho is such that there is a guarantee therein contained that rates fixed will never be unreasonable or unjust, and if this commission should attempt to fix an unreasonable rate the courts have the power to correct such unjust rate. In all cases where rates are fixed by commissions they are necessarily fixed by people who have more or less interest in the fixing of the rate. The legislature of the state, which is composed of citizens of the state, in many instances fix the rates themselves, and they fix rates which they, together with the other citizens of the state must pay, and yet it has never been held that merely on account of the fact that the members of the legislature as citizens of the state are interested in the rates fixed, that the rate on that account is unreasonable or unjust, or that it is an unjust exercise of the legislative power. This court said in the case of *Rogers Park Water Co. vs. Fergus*, 53 N. E., 363, 180 U. S., 624; 45 L. Ed., 702:

“The contention that members of the city council are agents of the people and their action in fixing rates for a water company is violative of the principle that no man can judge his own case is untenable, since said companies are quasi public corporations, and accept their corporate life subject to be controlled for the public good.”

The entire argument of counsel for plaintiff in this respect seems to be based upon the case of *Chicago*,

Milwaukee & St. Paul Railroad Co. vs. State of Minnesota, 134 U. S., 418; 33 L. Ed., 970.

In the Minnesota case, however, the statute was construed by the Supreme Court of the State of Minnesota to mean that the rate which should be fixed as provided by the statute should be final and conclusive.

It was held in the Minnesota cases with respect to said statute that there was no hearing provided for by the statute, no summons or notice to the company before the commission should make its finding, or opportunity provided, for the company to introduce witnesses before the commission, and in view of these conditions and the fact that the Supreme Court of the state had construed the statute as an attempt to fix final and conclusive rates, the Federal Supreme Court considered the statute invalid.

In San Diego Land & Town Co. vs. National City, the Minnesota cases above referred to are distinguished, and it was there held:

"When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty."

And that such a provision did not mean the fixing of final, arbitrary or conclusive rates, as the Minnesota statute was construed to provide for if such rates would amount to a confiscation. Where rates fixed are

unreasonable the water company may apply to the courts for relief.

174 W. 739, San Diego Land & Town Co. vs. National City, 74 Fed., 79; 43 L. Ed., 1154.

Polatka Water Works vs. City of Polatka, 127 Fed., 161.

Montezuma Town vs. Montezuma Water Works Co., 89 Pac., 794.

Spring Valley Water Works Co. vs. San Francisco, 124 Fed., 574.

But judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the right of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.

San Diego Land & Town Co. vs. National City, supra, End. Supreme Court Rep., Vol. 11, p. 991.

The case last cited in effect holds that no notice to the water company of fixing rates is necessary, where the constitution does not require a notice to be given.

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### CONCLUSION.

In conclusion upon the whole case, we submit that the unanimous decision of the Supreme Court of the State of Idaho should be affirmed; that that decision does not take away from the defendant and appellant

any right to which he is justly entitled, but only takes away from him the right to charge and collect from the citizens of Pocatello an unreasonable rate for water. The equity of this case is not with the defendant, but with the plaintiff. The plaintiff is merely asking the court to compel the defendant to comply with a reasonable and just statute, a general statute, applying generally to all corporations of this character in the State of Idaho, and a statute which has back of it a constitution which in terms provides that the legislature shall only have the right to establish reasonable maximum rates, and back of this constitution is a court with ample power to protect the defendant in the event that the commission provided for by the statute shall fix an unreasonable rate. A reference to the ordinance itself will show that the rates provided are excessive and the citizens of Pocatello have no opportunity for relief in this case under the terms of the ordinance. If this court shall hold that there is no relief in the courts, then defendant in this case is permitted by law to take from the citizens of Pocatello many thousand dollars annually to which he is not equitably entitled.

We submit that the law and equity of this case is with the plaintiff, and that the judgment of the Idaho court should be affirmed.

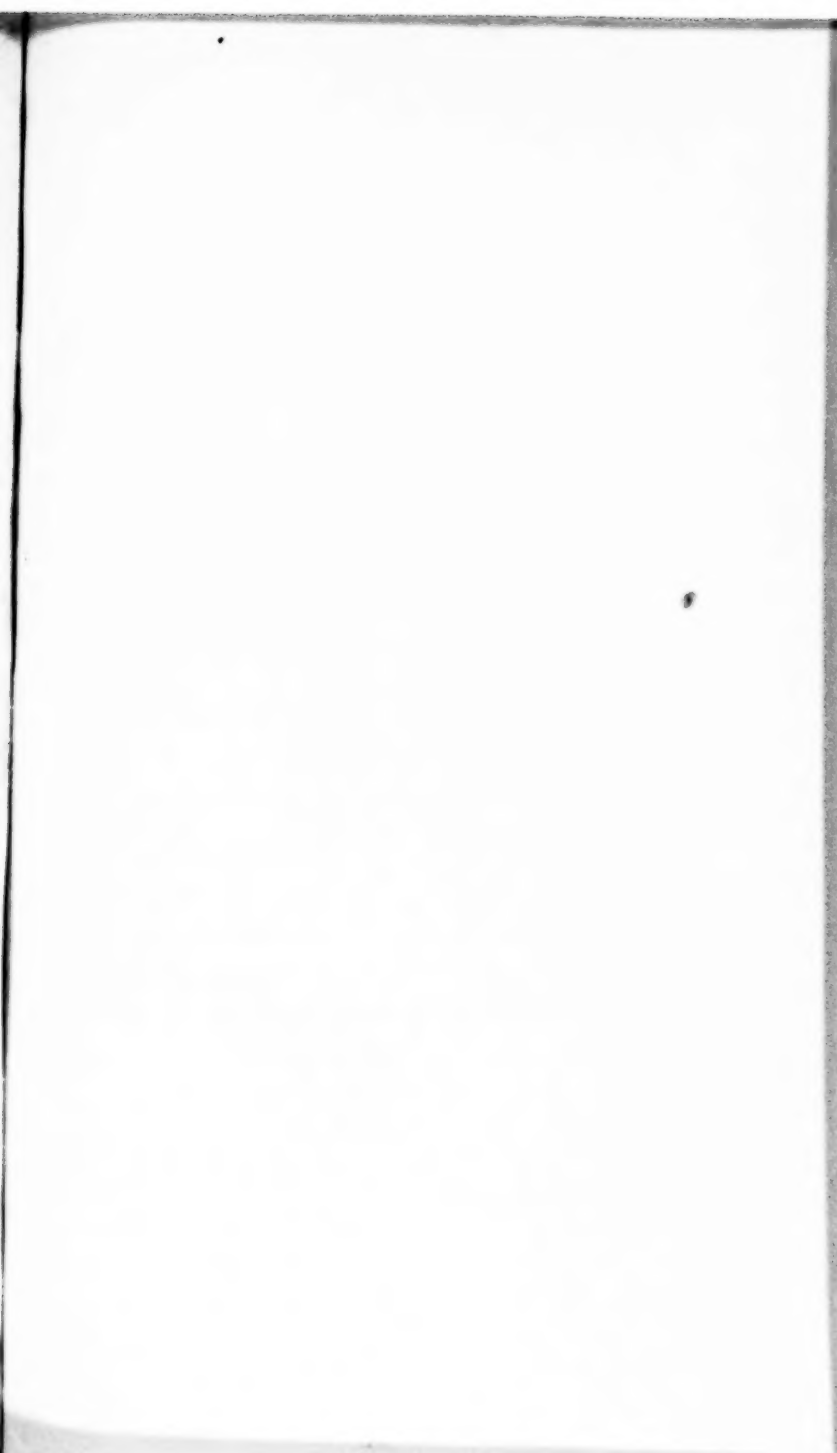
Respectfully submitted,

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MURRAY, DOING BUSINESS AS THE POCA TELLO  
WATER COMPANY, *v.* CITY OF POCA TELLO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 575. Argued December 3, 4, 1912.—Decided December 16, 1912.

This court is not prepared on the facts in this case to overrule the highest court of a State in construing the relative powers of the legislature and municipalities in establishing rates for water.

The Supreme Court of Idaho having held that under the Constitution of the State the legislature has a continuing and irrevocable power to establish the manner of fixing water rates, and that a municipality can only grant franchises subject to that power, this court follows that construction: and therefore *held* that:

A statute of the State of Idaho establishing a method for fixing water rates is not unconstitutional under the Federal Constitution as impairing the obligation of the contract with a water company under an ordinance of a municipality previously enacted and which established a different method of fixing such rates.

A court which is not empowered to grant relief whatever the merits may be, cannot decide what the merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res judicata* on the merits.

Where the judgment cannot be *res judicata* on the merits because the court has no power to grant relief, it is not made *res judicata* by reference to the opinion in which the court expresses its views on the merits.

21 Idaho, 180, affirmed.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of a statute of Idaho, are stated in the opinion.

Mr. William V. Hodges, with whom Mr. Gerald C. Hughes, Mr. Clayton C. Dorsey, Mr. A. A. Hoehling, Jr., and Mr. N. M. Ruick were on the brief, for plaintiff in error:

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Argument for Plaintiff in Error.

The obligation of the contract evidenced by Ordinance 86 has been impaired in violation of Article I, § 10, of the Federal Constitution, and plaintiff in error has been deprived of its property without due process of law, contrary to the provisions of the Fourteenth Amendment.

The Supreme Court of the State of Idaho did not give full faith and credit to the final judgment of the Circuit Court of the United States for the District of Idaho, rendered in *City of Pocatello v. Murray*, 173 Fed. Rep. 382, in violation of Article IV, section 1, of the Constitution, and thereby denied the title, right, privilege and immunity claimed by this plaintiff in error under the laws and authority of the United States.

Plaintiff in error's contention is not frivolous. The fact that the United States District Court, and the Supreme Court of Idaho, have officially expressed diametrically opposite views upon this question acquits the plaintiff in error of the charge of bringing to this court a frivolous and unfounded constitutional question, predicated on that state of facts and law.

No cases in this court have disposed of questions involving the impairment of the obligations of covenants, such as are contained in §§ 3, 4 and 5 of Ordinance No. 86, by legislative acts such as § 2839 of Idaho Revised Code, under like or similar constitutional provisions.

Such a condition of affairs is the strongest inducement for this court to exercise its jurisdiction to authoritatively conclude the question. *Forsyth v. Hammond*, 166 U. S. 514.

Defendant in error and the Supreme Court of Idaho conceded that the city had the power, both inherent and statutory, to enter into the contract, subject only to the power of the legislature to prescribe the manner in which maximum rates may be established.

The fixing of a rate or charge for public-service corporations is a legislative act. But no legislative officer, or

body, has the jurisdiction to conclusively determine the value of the plant.

There is no limit upon the rate that may be fixed, short of a confiscatory rate. If a company whose rates have been fixed, believes such rates to be confiscatory, such company may appeal to a court of equity for protection. Then, for the first time, are the parties before a tribunal which has power to conclusively determine the value of the plant, and the reasonableness of the rates fixed.

Private individuals may, by covenant, provide means for fixing the values of the subject-matter of their contracts; provide what shall be considered a reasonable, and what an unreasonable, return on an investment made thereunder; and such covenants are incidents of ordinary business transactions. The parties thereto are by such covenants estopped from contending that the facts therein established by covenant are to the contrary thereof, or that the method of establishing such facts should not be observed, unless there is an element of fraud or other element invalidating such covenants. When a city enters into such covenants as are contained in Ordinance 86, it likewise is exercising its business and proprietary powers as distinguished from its legislative powers. *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1.

When a body authorized by law to hold a legislative inquiry for the purpose of determining the rate charges for public service takes jurisdiction to make such determination, it is a tribunal, and the parties to the rates are parties to the controversy before it for determination. *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 401; *Cedar Rapids G. L. Co. v. Cedar Rapids*, 144 Iowa, 426; *Willcox v. Consolidated Gas Co.*, 212 U. S. 47; *Prout v. Starr*, 188 U. S. 537.

The parties to any judicial proceeding may estop themselves as to the facts by a solemn agreement, stipulation or statement of facts. See *Blankinship v. Oklahoma*

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Argument for Plaintiff in Error.

*Water Co.*, 43 Pac. Rep. 1088; 11 Columbia Law Review (No. 6), pages 537 and 533, Mr. Edward C. Bailly's article on "Legal Basis of Rate Regulation," 2; *Des Moines v. Welsbach Street Lighting Co.*, 188 Fed. Rep. 906; *Ills. Trust & Sav. Bank v. Arkansas City*, 76 Fed. Rep. 271.

The reservation of the power to prescribe the manner of fixing rates ought to be construed to be consistent with the other terms of the ordinance, and unless the reserved power to "prescribe the manner of fixing rates" is necessarily in conflict with the other provisions of the ordinance, it ought not to be held to justify the annulment of such other provisions.

Before a reserved power can justify the abrogation of an express grant from the same authority, it must clearly appear that the exercise of the reserved power will necessarily conflict with the grant. *Jack v. Grangerille*, 9 Idaho, 291; *Cordwal v. American Bridge Co.*, 113 U. S. 205, and *L. & N. R. Co. v. Mottley*, 219 U. S. 31, bear but remotely upon the question. *Wolf v. New Orleans*, 103 U. S. 358, distinguished.

The commissioners to be appointed under § 2839 must be taxpayers of the city, and even those which the plaintiff in error may select must be taxpayers; such a commission could not be a fair, impartial and unprejudiced tribunal. *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 274, does not apply, as in that case the city council or governing body were given such power.

All the questions involved are now before this court, which possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired. *Columbia W. R. Co. v. Columbia*, 172 U. S. 475.

The Federal question involved has not been so often decided that it is no longer a substantial question in this court. Nothing in the decisions of this court is conclusive upon the questions. *Tampa Waterworks Co. v. Tampa*,

199 U. S. 241; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265; *L. & N. R. Co. v. Mottley*, 219 U. S. 465, do not apply.

The refusal of the Supreme Court of Idaho to sustain a plea of *res judicata*, based on a judgment of the Circuit Court of the United States for the District of Idaho, presents a Federal question, under the "full faith and credit" clause of the Constitution, and under § 709, Rev. Stat. *Phœnix Ins. Co. v. Tennessee*, 161 U. S. 185; *Dowell v. Applegate*, 152 U. S. 327; *Aurora City v. West*, 7 Wall. 82 at 106.

That court decided that § 2839 was not enforceable as against the provisions of Ordinance 86; and that decision became the law of the case as between the parties—*res judicata*. By that decision the plaintiff in error became better assured of his right, and confirmed therein. A judgment of dismissal on demurrer, with no limitations placed thereon, is a judgment on the merits. *Durant v. Essex Co.*, 7 Wall. 107; *Forsyth v. City of Hammond*, 166 U. S. 506; *Baker v. Cummings*, 181 U. S. 125; *Aurora City v. West*, *supra*; *Swan Land & C. Co. v. Frank*, 148 U. S. 612.

*Mr. D. Worth Clark*, with whom *Mr. Jesse R. S. Budge*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for defendant in error.

Memorandum opinion by direction of the court. By  
MR. JUSTICE HOLMES.

This was an application by the defendant in error for a mandate requiring the plaintiff in error, Murray, to appoint commissioners to act with commissioners appointed by the city in determining water rates to be charged by Murray. Murray relied upon an ordinance of June 6, 1901, as establishing by contract the only method of fixing rates. The city relied upon a subsequent statute, § 2839, Rev. Code. The Supreme Court of the State held that the

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Opinion of the Court.

constitution in force when the ordinance was passed made it impossible for the city to make a contract on the matter beyond the power of the legislature to change. The constitution declared the use of waters distributed for a beneficial use to be a public use and subject to the regulation and control of the State, and also declared the right to collect rates for water to be a franchise that could not be exercised except by authority of and in the manner prescribed by law. It then ordained that the legislature should provide by law the manner in which reasonable maximum rates might be established. Article 15, §§ 1, 2, 6. The court relied upon *Tampa Water Works Co. v. Tampa*, 199 U. S. 241; *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, and *Louisville & Nashville Railroad Co. v. Mottley*, 219 U. S. 467, which so far sustain its conclusion that we think further discussion unnecessary. We are not prepared to overrule the construction of the legislative power as continuing and irrevocable adopted by the Supreme Court of the State.

A defence more relied upon was *res judicata*. In 1909 the city brought a bill in equity in the Circuit Court seeking to have the court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. Rep. 382. In the opinion, it is true, the court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided and the only point that could be decided was that the demurrer should be upheld and that the court was without jurisdiction to "take upon itself the exercise of the 'legislative or administrative' power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years." 173 Fed. Rep. 385. The

demurrer excludes a decision upon the merits, and even if the decree referring to it did not have the same effect by itself, the opinion to which the decree also refers would show the same thing. Of course if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co. v. Wilfong*, 223 U. S. 543, 559, and when jurisdiction to grant equitable relief was denied the ground of the merits could not be reached. In *Forsyth v. Hammond*, 166 U. S. 506, jurisdiction had been taken in the earlier decision relied upon. Here it was refused.

*Judgment affirmed.*

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